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# LAW

OF

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A

# TREATISE

ON

# THE LAW OF SHIPPING.

BY

HENRY FLANDERS,

AUTHOR OF

"A TREATISE ON MARITIME LAW."

PHILADELPHIA:

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# PREFACE.

Having endeavored, in a previous volume, to collect and embody the doctrines of the maritime law, upon several of the topics belonging to that branch of our jurisprudence, the author has thought that the performance of the same task with respect to the subjects contained in the present volume, would not be unacceptable to the Profession.

In the plan of the work, the author has aimed more at practical convenience than scientific arrangement.

He cannot forbear to observe in this place, that the Federal Courts, in the exercise of their enlarged Admiralty jurisdiction, have reflected honor upon the moral and intellectual elevation of the American Judiciary. And in collecting together the principles which they have recognised or established upon the various questions that have been presented for their adjudication, the author trusts that he has done the Profession "some service."

Philadelphia, 1853.

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# PART I.

THE

# LAW OF SHIPPING.

## CHAPTER I.

### OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

1. The maritime law, with providence and forecast, has assigned the powers, defined the rights, and prescribed the duties of that large and meritorious class of the citizens of every maritime state, who are employed in the navigation of its merchant vessels. The refinements of modern civilization have mitigated or abrogated many of its rules, reducing in many instances the power of the master on the one hand, and conferring on the other, additional and superior privileges upon the mariner. The edifice has been enlarged and improved, but the original foundation remains. Higher praise could not be bestowed upon the practical skill of comparatively rude architects, than is indirectly expressed in this significant fact.

2. In the appointment of the master, the law puts no restraint upon the shipowners, great and extensive and important as are his powers and duties.[1]

[1] The reader will find a very interesting treatise, in the "Sea Laws," p. 442, upon owners, masters, and mariners. It is pro-

By holding them responsible for his conduct, the law insures care and circumspection in his selection. The master of a vessel is bound to his owners, and he and they to every one who may be affected by his

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fessedly taken from Molloy's work (*De Jure Maritimo*), and the maritime codes. In the third article it is said: "The persons ordinary for sailing in ships, have divers denominations; the first, which is the master, is known to us and most nations, both now and of old, and especially by the Roman laws, is termed *navicularius* or *magister*, or *exercito navis*, in English rendered master; in the Teutonic, skipper; by the Grecians, *navarchus* or *nauclerus;* by the Italians, *patrono*. But this is only to those vessels that are ships of burden and carriage: for in ships of war the principal officer is commonly called commander or captain. The next in order of office to the master, is he who directs the ship in the course of her voyage; by the French called *pilote*, by the English pilot, and by the Flemings *steersman*, by the Romans *gubernator*, by the Italians *nochiero*, *pillotto*, and *navarchus;* and the third is esteemed the master's mate or companion, especially if the master be steersman himself; of old, by the Grecians and Romans called *proreta;* his charge is to command all before the mast.

"His successor in order is the carpenter or shipwright, by these two nations of old called *naupegus* and *calaphates*. From the loins of one of that rank sprang that great emperor, Michael, surnamed Calaphates, who denied not to own the quality of his father among his regal titles. The very name *calaphates*, the Venetians and most of the Italians still use to this day.

"The next who succeeds in order, is he who bears the charge of the ship's boat, by the Italians called *brachiere*, and by the Grecians and Romans *carabita*, from *carabus*, which denotes the boat of a ship.

"The sixth in order, especially in ships of burden, is the clerk or purser, by the Italians called *scrivano*, whose duty is the registering and keeping the accounts of all received in or delivered out of the ship; for all other goods that are not by him entered, or taken into charge, if they happen to be cast overboard in a storm, or are stolen or embezzled, the master answers them not,

acts, for his skill and care in the management of the vessel under his command.[1] The master is answerable civilly, as well for an error in judgment as for a fault of the heart. The law requires of him reasonable care, attention, prudence, and fidelity; and if any misfortune or mischief ensues from the want of them, either in himself or his mariners, he is responsible in a civil action.[2] The owners of the vessel, being answerable in damages for the misconduct of the master, he as the actual malfeazor is accountable over to them.

3. The maritime law regards the sailor as a citizen of the world. His home and employment are emphatically upon the deep. In peace, and unless prohibited by his own sovereign, he may engage his services in any vessel and of any nation. Wherever he sails, and under whatever flag, he is never beyond

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there being no obligation on him by law for the same; his duty is to unlade by day, not night.

"The seventh is a most necessary officer, called the cook.

"The eighth is the ship's boy, who keeps her continually in harbors, called of old by the Grecians *namphylakes*, by the Italians *guardino;* these persons are distinct in offices and names, and are likewise distinguished in hires and wages. The rest of the crew are under the common name of mariners, by the Romans called *nautæ;* but the tarpaulins, or those youths or boys that are apprentices, obliged to the most servile duties in the ship, were of old called *mesonautæ.*"

[1] Purviance v. Angus, 1 Dall. R. 180.

[2] Id. Stone v. Ketland, 1 Wash. C. C. R. 142.

[3] Purviance v. Angus, supra. See, also, as to the master's liability, Atkyns v. Burrows, 1 Peters' Adm. R. 245; Dusar v. Murgatroyd, 1 Wash. C. C. R. 13; Scheiffelin v. Harvey, 6 John. R. 170.

the protection of law. In war, however, neutrals must look well to the national character of the seamen employed on board their ships; because belligerents may deem it proper, and in accordance with the principles of international law, to pronounce upon the national character of the ship from the national character of the crew. By the prize law of France and Denmark, if the officers and two-thirds of the crew of a neutral vessel are of the enemy's country, she thereby loses her neutral character, and is liable to capture and condemnation. So, too, seamen of a neutral country, entering the merchant service of a belligerent, will have their national character determined by that of the vessel in which they are found.

3 a. Congress, during the last war, thought proper, by an act which has always been practically inoperative, to declare that, from and after the termination of the war, it should not be lawful to employ on board any of the public or private vessels of the United States, any person or persons except citizens of the United States, or persons of color, natives of the United States; nor so to employ any naturalized citizen of the United States, unless such citizen shall produce to the commander of a public vessel, if to be employed on board such vessel, or to a collector of the customs, in other cases, a certified copy of the act by which he shall have been naturalized, setting forth such naturalization and the time thereof.[2]

[1] Jacobson's Sea Laws, Book ii. chap. 2; 2 Brown's Civ. and Adm. Law, 515; The Frederick, 5 Robinson's Adm. R. 8; The Embden, 1 Id. 16; The Vigilantia, Id. 1; Curtis's Merchant Seamen, p. 7.

[2] Act U. S., March, 1813, ch. 184, sec. 1, 2. Section 3 of the

4. It is also provided by the same Act, that from the date of its taking effect, no seaman or other seafaring man, not being a citizen of the United States, shall be admitted or received as a passenger on board of any public or private vessel of the United States, in a foreign port, without permission in writing from the proper officers of the country of which such seaman or seafaring man be subject or citizen.[1] The penalty for a violation of the provisions of this Act by the commander of a public vessel, is the forfeiture and payment of one thousand dollars, for each person thus unlawfully employed or admitted on board such vessel. And if, contrary to the prohibitions of the Act, any person shall be employed or received on board of any private vessel, the master or commander, and the owner or owners of such vessel, knowing thereof, shall respectively forfeit and pay five hun-

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same act further provides, That in all cases of private vessels of the United States, sailing from a port in the United States to a foreign port, the list of the crew, made as heretofore directed by law, shall be examined by the collector for the district from which the vessel shall clear out, and if approved of by him, shall be certified accordingly. And no person shall be admitted or employed as aforesaid, on board of any vessel aforesaid, unless his name shall have been entered in the list of the crew, approved and certified by the collector for the district from which the vessel shall clear out as aforesaid. And the said collector, before he delivers the list of the crew, approved and certified as aforesaid, to the captain, master, or proper officer of the vessel to which the same belongs, shall cause the same to be recorded in a book by him for that purpose to be provided, and the said record shall be open for the inspection of all persons, and a certified copy thereof shall be admitted in evidence in any court in which any question may arise under any of the provisions of this act.

[1] Ibid. sec. 5.

dred dollars for such person thus unlawfully employed or received in any one voyage; which sum or sums shall be recovered, although such seaman or person shall have been admitted and entered in the certified list of the crew aforesaid, by the collector for the district to which the vessel may belong.[1] Nothing contained in the Act, however, is to be construed so as to prohibit any commander or master of a public or private vessel of the United States, whilst in a foreign port or place, from receiving any American seaman in conformity to law, or supplying any deficiency of seamen on board such vessel, by employing American seamen, or subjects of such foreign country, the employment of whom shall not be prohibited by the laws thereof.[2]

But as we have already observed, the provisions of this Act are practically inoperative, and for the reason that they are to have no effect with respect to the employment as seamen of the subjects or citizens of any foreign nation which shall not, by treaty or special convention with the government of the United States, have prohibited on board of her public and private vessels the employment of native citizens of the United States, who have not become citizens or subjects of such nation.[3] No nation, that I am aware of, has thus excluded our seamen from employment on board its vessels, and until it shall be done, the Act is nugatory.

5. By another Act,[4] anterior to the one we have considered, it is made the duty of our consuls and

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[1] Ibid. sec. 7, 8. [2] Ibid. sec. 9. [3] Ibid. sec. 10.

[4] Act of 1803, Ch. 62; known as the Consular Act.

vice-consuls to provide for destitute seamen within their districts, and it requires all masters of American vessels bound to some port of the United States, on request of our consuls and vice-consuls, &c., to take such seamen on board, and transport them to the United States upon certain terms and conditions prescribed by the Act, and it inflicts upon the masters a penalty of $100 for refusing to do so. It has been held, that a foreigner employed as a seaman in a merchant ship of the United States, is to be deemed "a mariner and seaman of the United States," within the language and policy of this Act.[1]

By the Act of 1817,[2] no fishing bounty is allowed to vessels engaged in the fisheries, unless the officers and three-fourths of the crew are citizens. And vessels engaged in the coasting trade must pay a foreign tonnage duty, unless the officers and three-fourths of

[1] Matthews v. Offley, 3 Sum. R. 115. It was argued in this case, that foreigners are no longer to be considered as holding the character of mariners and "seamen of the United States," than while they actually belong to a ship of the United States in that character. Judge Story thought the proposition not maintainable in its full extent. He said that it would involve great inconveniences and hardships, and be repugnant to the sound policy of the Act. "It seems to me," he said, "that, where a foreign seaman has once acquired a domicil in the United States, and is engaged in our merchants' service, and retains, if I may so say, the habits of that service, and upon every discharge from one ship still has the *animus revertendi* to that service and domicil, he must be treated as intending to retain his acquired character of an American seaman, and his acquired American domicil. Some overt act on his own part, such as engaging in some foreign service, or resuming his original native character, or disowning his American character and domicil, seems to me indispensable to rebut the presumption, that he still attaches himself to the American service."

[2] March 1, 1817, ch. 204, sec. 3, 5, 6.

the crew are citizens. And the same penalty is incurred by vessels employed in foreign trade, unless their officers and crew in the same proportion are citizens. It is observed by Mr. Curtis[1] that these last penalties are cumulative upon those of the former Act; so that masters and owners shipping foreign seamen who belong to countries against which that Act operates, are still subject to the penalty of five hundred dollars for each person.

Foreigners employed on board of vessels subject to these acts, for a purpose not directly connected with their navigation, are not to be deemed part of the crew, simply because they now and then pull a rope, or assist in a way that any other man of sufficient strength and activity might do. Thus, it was held by Lord Stowell, that foreigners hired to take care of a cargo of mules on board a British ship, were not to be deemed part of the crew within the provisions of the navigation laws requiring British ships to be manned by a certain proportion of British seamen.[2] It was also held by Lord Stowell, in another case, that goods imported in a British ship not manned and navigated according to law, are not liable to forfeiture, if the imperfect manning of the ship was a matter of uncontrollable necessity.[3] The

[1] Merchant Seamen, p. 9.

[2] George the Third, 1 Dod. Adm. R. 311.

[3] The Pelican, 2 Ibid. 194. It would be monstrous if the commander of a public ship were held liable to the statute penalty, by manning her contrary to the provisions of the statute, in a case of imperative necessity. Every consideration of public policy and convenience forbid any such interpretation of the law. True, public policy and convenience neither constitute nor overthrow the law, but they are always good interpreters of what is doubtful;

principle of these decisions is equally applicable to the provisions of our acts. Cases of absolute necessity are cases of unavoidable dispensation.

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because it is not to be presumed that the statute was either blind to public consequences, or indifferent about them; that it either did not see the inconvenience, or meant to impose it. The Swift, 1 Dod. Adm. R. 320, 344.

# CHAPTER II.

## OF STATUTORY PROVISIONS WITH RESPECT TO SEAMEN.

I. Of the Shipping Articles.
II. Of the Seaworthiness of the Vessel.
III. Of the Supplies required to be put on board.
IV. Of the Medicine Chest.

### I. OF THE SHIPPING ARTICLES.

6. In all voyages from any part of the United States to any foreign port, and in all coasting voyages from one State to any other than an adjoining State, the master, before proceeding on such voyage, is required, by Act of Congress,[1] to make an agreement, in writing or print, with every seaman or mariner on board (except such as shall be apprentice

[1] Act of July 20th, 1790, ch. 56, sec. 1. It was held by Judge Ware, in the case of the Crusader, Ware's R. 437, that a general coasting and trading voyage, in which the vessel goes to ports in different States of the Union, is within the statute requiring the contract to be in writing; and that if a seaman is shipped for such a voyage, without any limitation of time, or any final *terminus* of the voyage, either party, the master or the seaman, may put an end to the contract at pleasure, provided it is not done at a time and under circumstances particularly inconvenient to the other party. See also Curtis's Merchant Seamen, 39.

or servant to himself or his owners), declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped.

7. If he fails to do this, he forfeits twenty dollars for every such seaman or mariner, and is required to pay every such seaman or mariner (for the whole voyage, if he performs it; or, if not, then for such time as he continues to do duty on board the ship) the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping, and such seamen or mariners not having signed such contract shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in the Act. By a subsequent and recent Act, it is declared, that all shipments made contrary to the provisions of that Act and other Acts of Congress, shall be void, and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given at his shipment.[1]

[1] Act of July 20th, 1840, chap. 23, sec. 10. By the Act of 28th Feb. 1803, it is provided, That, before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs, a list, containing the names, places of birth, and residence, and a description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them, and the said collector shall deliver him a certified copy thereof, for which the collector

8. With respect to this provision of the law, there are one or two points to be particularly noted. In

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shall be entitled to receive the sum of twenty-five cents; and the said master shall, moreover, enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibit the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States at which he shall arrive, on his return thereto, and then and there also produce the persons named therein, to the said boarding officer, whose duty it shall be to examine the men with such list, and to report the same to the collector; and it shall be the duty of the collector at the said port of arrival (when the same is different from the port from which the vessel originally sailed) to transmit a copy of the list so reported to him, to the collector of the port from which said vessel originally sailed, *provided*, that the said bond shall not be forfeited on account of the said master not producing to the first boarding officer, as aforesaid, any of the persons contained in the said list, who may be discharged in a foreign country, with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent, there residing, signified in writing, under his hand and official seal, to be produced to the collector with the other persons comprising the crew, as aforesaid; nor on account of any such person dying or absconding, or being forcibly impressed into other service, of which satisfactory proof shall be then also exhibited to the collector. Sec. 1.

The Act of July 20, 1840, supra, with reference to the foregoing provision, provides as follows: *First.* The duplicate list of the crew of any vessel bound on a foreign voyage, made out pursuant to the Act of Feb. 28, 1803, shall be a fair copy in one uniform handwriting, without erasure or interlineation. *Second.* It shall be the duty of the owners of every such vessel to obtain from the collector of the customs of the district from which the clearance is made, a true and certified copy of the shipping articles, containing the names of the crew, which shall be written in a uniform hand, without erasures or interlineations. *Third.* These documents, which shall be deemed to contain all the conditions of contract with the crew, as to their service, pay, voyage, and all other things, shall be produced by the master, and laid before any consul, or other

the first place, it relates to foreign voyages and coasting voyages from one State to any other than an adjoining State. Neither a whaling nor fishing voyage is included within the meaning or intent of this act.

A foreign voyage means, in the language of trade and commerce, a voyage to some port or place within the territory of a foreign nation. But the ocean is deemed the common highway of all nations, and foreign to none. Hence a whaling or fishing voyage is not deemed to be a foreign voyage within the meaning of the various Acts of Congress using that phrase, or one of equivalent import.[1] It is the usage in the whaling business to reduce the contract with the mariners to writing, but it is not essential to its validity, that this should be done. There is no Act of Congress making it necessary. We shall see presently, that the contract with fishermen, engaged in the bank and other cod-fisheries, must be made in writing or print before they proceed on the voyage,

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commercial agent of the United States, whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance. *Fourth.* All interlineations, erasures, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such paper, unless satisfactorily explained in a manner consistent with innocent purposes, and the provisions of law which guard the rights of mariners.

[1] Taber v. United States, 1 Story's R. 1, 7. See also the case of Morris v. Connell, 6 Law Reporter, 304. Where the contract for a whaling voyage was reduced to writing, and where a clause, providing, that if any officer, after a fair trial of his ability, should be judged by the master to be incompetent, might be displaced, was held by the District Court of Massachusetts to be obligatory upon the parties.

the same as with seamen engaged in the merchant service.

9. In the interpretation that has been put upon this Act, there has been no conflict of judicial opinion. It has been uniformly held, that the shipping articles must declare explicitly the ports at which the voyage is to commence and terminate.[1] The language of the law is plain. It requires "the voyage or voyages, term or terms of time, for which every seaman or mariner on board shall be shipped," to be set forth in the contract. Hence when the articles specify a voyage from Baltimore "to Curaçoa and elsewhere," the words, "and elsewhere," are either rejected for uncertainty, or construed as subordinate to the voyage specified. In any event, they can only authorize the pursuing such a voyage as may be necessary to accomplish the principal voyage.[2]

10. In a case before Lord Stowell, where the voyage was described in the shipping articles, as a voyage from London to New South Wales and India, and to return to a port in Europe, the words, "or elsewhere," were added in the margin in a way hardly legible, and without any reference as to where they were to come in. Lord Stowell was strongly inclined to hold, upon the evidence, that the words, "or elsewhere," did not compose any part of the text of the original contract; but if they did, "I have no

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[1] Magee v. The Moss, Gilpin's R. 219; Wood v. The Nimrod, Ibid. 83; Brown v. Jones, 2 Gallison, R. 477; see, also, U. S. v. Staly, 1 W. & M. 338.

[2] 1 Hall's Law Journ. 209; see Thompson v. Ship Oakland, 4 Law R. 349.

hesitation in asserting," he observed, "that they are not to be taken in that indefinite latitude in which they are expressed; they are no description of a voyage; they are an unlimited description of the navigable globe, and are not to be admitted as a universal *alibi* for the whole world, including the most remote, and even pestilential shores, indefinite otherwise, both in space and time. They must receive a reasonable construction, a construction which, I readily admit, must be, to a certain extent, conformable to the necessities of commerce. The word 'elsewhere' must, in its construction, vary much, according to the situation of the primary port of destination. If it is applied to a country remote from all neighboring settlements, it is entitled to a larger construction; if to one which is surrounded by many adjacent ports, the limitation would be much narrowed; and I cannot help observing here, that the captain has deprived himself of an extensive latitude, by describing his primary port to be in the neighborhood of many adjacent ports which could supply cargoes."

11. "Where a trade is carried on notoriously in an established course, and that in a remote part of the world, where various obstructions may occur, I will not say, that the Court might not strain hard to support a change of voyage, even on an imperfect description of it contained in the articles, if it appeared conformable to the general routine of the commerce there carried on, and presumed to be generally known to all persons who resorted there. In the case, for instance, of a return voyage to India to collect a cargo, if it

was the constant habit of vessels to pursue any established course, the Court might possibly favor such a construction of the contract, although not specifically expressed, though it would certainly very much improve the Court's view of such a question, if that appeared to have been done, which appears by the evidence here to have been done in several instances, —making an addition to the rate of wages conformable to the value of navigation and sea service in that quarter of the globe; for that might be properly considered by the owners, and perhaps by the Court, as taking their fair share in the disadvantages that attended such an adventure."[1]

12. If there is any ambiguity, uncertainty, or obscurity in the shipping contract, especially in the description of the voyage, the construction most favorable to the seamen will be adopted. The reason is obvious. It is the owners who give the description of the voyage; and on general principles, applying to all contracts, if the language is ambiguous

[1] The Minerva, 1 Hagg. Adm. R. 347; The George Horne, Id. 370; The Countess of Harcourt, Id. 249; The Eliza, Id. 182; The Cambridge, 2 Hagg. R. 243; Brown v. Jones, 2 Gallison, R. 477. In this latter case a mariner shipped on a voyage "from Boston to the Pacific, Indian, and Chinese Oceans, or elsewhere, on a trading voyage; and from thence back to Boston," with a stipulation, that two months' wages should be paid on arrival at Canton; the voyage being in fact a trading voyage to the Northwest Coast for furs. It was held, that the outward voyage terminated at Canton, and that the shipping articles did not authorize a return from Canton to the Northwest Coast; and that, therefore, it was not a desertion in a mariner to leave the ship at Canton, it being the intention of the ship to return to that coast. The Ship Moss, Gilpin's R. 219.

or uncertain in its meaning, the construction shall be against the party who uses it, because he is bound to express himself clearly; and this principle applies with all its force to contracts between owners, who are always men conversant in business, and shrewd and watchful in looking to their own interests, and seamen, who are proverbially careless, improvident, and ignorant. The disparity in the condition of the parties imposes on a Court of Admiralty the duty to take care that the improvidence of seamen is not entrapped, by the superior watchfulness and sagacity of owners, into engagements that they did not intend to make.[1]

13. Hence, when in the shipping articles of an English vessel, the voyage was described to be from Liverpool to Savannah, and any port or ports of the United States, of the West Indies, or of British North America, the term of service not to exceed twelve months, it was held that the voyage intended was confined to the ports on the eastern shore of the continent, and that the articles did not authorize a voyage to San Francisco, on the Northwest Coast. The description would naturally suggest to the seamen a voyage to those ports which were familiar to the commerce of their country, and which were frequently and ordinarily visited for the purposes of trade, that is, to British and American ports on the eastern shore of the continent.[2]

14. The result of the cases is, that when the *ter-*

[1] The Heinrich, Crabbe's R. 226; The Ada, Davies' R. 407.

[2] The Ada, *supra*.

*minus a quo* and the *terminus ad quem* are fixed, but loose and indefinite expressions are employed as to the further course of the voyage, they will either be rejected for uncertainty, or construed as subordinate to the principal voyage stated in the preceding words. It should be observed, that the master must avail himself of the ports described in the contract, in the order in which they stand, and cannot recur back from the last to any former port. Thus, shipping articles for a voyage from "Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia," authorize a voyage directly from Gibraltar to South America, without proceeding to any intermediate European port, but not a return afterwards from thence to a European port.[1]

15. If by the terms of the shipping contract, the master is left at liberty to use his discretion as to the intermediate course of the voyage, he may carry the vessel to a port not named, without thereby violating the contract. Thus, where the shipping-articles described the voyage to be "from New York to Darien, thence to St. Thomas, thence to New Orleans," "or as the master may direct," and back to New York, it was held to be no violation of the contract with the seamen to stop at a place not named, and afforded no justification to them for leaving the vessel.[2]

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[1] Douglass v. Eyre, Gilpin's R. 147; Brown v. Jones, 2 Gallis. 477.

[2] The Nimrod, Gilpin's R. 83. If the shipment is for an indefinite period, the seamen are at liberty to leave the ship, after the

16. Upon this principle, it has also been held, that when the shipping articles declare the voyage to be "from Philadelphia to South America, or any other port or ports, backward and forwards, when and where required, and back to Philadelphia," they are not violated, if the master proceeds from South America to Europe; and his doing so affords no justification to the mariners for leaving the vessel.[1] It

termination of any particular voyage, and the discharge of cargo at the port of delivery. The Heinrich, *supra;* see also The Crusader, Ware's R. 437; Thompson v. Ship Oakland, 4 Law Rep. 349. The shipping articles in this case described the voyage to be from Boston to one or more ports in Europe and back to a port of discharge in the United States: It was held, that the description was sufficiently certain to bind the parties to the performance of the voyage. And the owners refusing to do so, and the ship returning with the seamen on board to the home port, a sum equal to one month's wages was allowed to each seaman, as compensation for the loss of the voyage to Europe. As to this latter point, see Wolf v. The Oder, 2 Pet. Ad. R. 261; Hindman v. Shaw, 2 Pet. 265.

[1] The Ship Moss, Ibid. 219. In delivering his opinion in this case, Judge Hopkinson said:—The voyage described in the articles is "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia, unless sooner discharged." This is certainly a very awkward description of a voyage. South America is spoken of as a port to which they are to go, "or" to any other port or ports, without any designation of them, whether in Europe or America; but they are to go backwards and forwards, when and where required. It will not do to tie down these contracts, made sometimes in a counting-house, and sometimes in the cabin of a ship, to the strict rules of composition. We must endeavor to come at the true meaning of the parties, and to give the contract a reasonable construction; to take care to put upon general words a just and reasonable limitation; but not lightly to destroy and avoid the whole contract because the generality or breadth of the

was contended at the argument, and we think with great force of reasoning, that inasmuch as the ship was going from Havana to Marseilles, in Europe, the voyage was not within the contract, and the seamen were not bound to go with her. That the breach of the contract was on the part of the captain, in taking the ship to a place not within the terms of the articles. That the language employed was indefinite, both in space and time, and was no proper description of a "voyage or voyages." That the terms of the contract were as uncertain, as the term "or elsewhere," and that the voyage to Europe was not subordinate to the principal voyage described. But, as before observed, it was held that this voyage or these voyages were strictly within the terms of the contract.

17. The shipping articles and list of the crew are deemed to contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things.[1] And all shipments made contrary to the Act of 1840, and other preceding Acts of Con-

expressions may be in a degree uncertain, or might be used to impose an oppressive service. The Court will take care that this shall not be done, and will avoid the whole if they cannot so limit it. In the present case, I can see nothing unreasonable or oppressive in the construction the captain has put upon these articles. He took the ship to Buenos Ayres; he then went to Havana, and from thence to Marseilles; he came again to a port in South America, and then terminated the voyage by returning to Philadelphia. This voyage, or these voyages, were strictly within the terms of the contract; and, in my opinion, no unjust or oppressive use has been made of the awkward manner in which the contract is expressed.

[1] Act of July 20, 1840, sec. 3.

gress, are void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.[1] The second section of this Act requires the owners of every vessel bound on a foreign voyage to obtain from the collector of the customs of the district from which the clearance is made, a true and certified copy of the shipping articles, containing the names of the crew, which shall be written in a uniform hand, without erasures or interlineations. And the fourth section provides, that all interlineations, erasures, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes, and the provisions of law which guard the rights of mariners.

18. The Legislature, when it declares that the articles and list of the crew "shall be deemed to contain all the conditions of contract with the crew as to their pay, voyage, and all other things," does not declare that those conditions shall be conclusive and binding on all parties for and during the time so agreed and contracted for. On the contrary, a Court

[1] Ibid. sec. 10. A parol understanding that the vessel was not to complete the voyage described in the shipping articles, is not admissible. Inability to obtain freight is not such a necessity as absolves the owner from his contract to perform the voyage described in the articles. Thompson v. Ship Oakland, 4 Law Rep. 349.

of Admiralty in interpreting the conditions of a mariner's contract, if it finds that they derogate from the general rights and privileges of seamen, will declare them void, as founded upon imposition or an undue advantage taken of the necessities and ignorance and improvidence of this class of men, unless two things concur: first, that the nature and operation of the clause is fully and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them. And the *onus probandi* is on the ship-owner to establish these facts.[1]

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[1] Brown v. Lull, 2 Lum. R. 443; The Juliana, 2 Dod. R. 504; The Minerva, 1 Hagg. Ad. R. 347; Swift v. Clark, 15 Mass. 443; The George Home, 1 Hagg. Ad. R. 370; Harden v. Gordon, 2 Mason, 541. In this latter case, it was said by Judge Story, that "every Court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected, and need counsel; because they are thoughtless, and require indulgence; because they are credulous and complying, and are easily overreached. But Courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the Admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as Courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que* trust with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. . . . . Every deviation from the terms of the common shipping paper (which stands upon the general doctrines of maritime law) is rigidly inspected; and if additional burthens

19. A Court of Law might be disposed to interpret a seaman's contract upon the same principles that it applies to all other contracts.[1] A Court of law works its way to short issues, and confines its views to them. A Court of Equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. A Court of Admiralty is bound, by its commission and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice.[2] Hence the latitude which it allows to itself, in the interpretation of seamen's articles. *Prima facie*, they are presumed to import verity. At the same time they are not deemed absolutely conclusive. They are open to evidence of fraud, mistake, or interpolation.[3]

20. By the Act of 1790, the time, the day, and hour, when the seamen shall render themselves on

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or sacrifices are imposed upon the seamen, without adequate remuneration, the Court feels itself authorized to interfere and moderate or annul the stipulation. And on every occasion the Court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen."

[1] See Appleby v. Dods, 8 East, 300; Jesse v. Roy, 1 Cromp. Jerv. & Rose. R. 316, 329, 339. An agreement contrary to the policy of a statute is void both in law and equity.

[2] The Juliana, 2 Dod's Adm. R. 504.

[3] Willard v. Dorr, 3 Mason's R. 161; The Isabella, 2 Rob. Ad. R. 241; Baker v. Corey, 19 Pick. 496; Veacock v. M'Call, 1 Gilpin's R. 329; Wickham v. Blight, Id. 452; Porcupine, 1 Hagg. R. 378; The Harvey, 2 Id. 79; The Prince George, 3 Hagg. R. 376.

board, is to be entered at the foot of such agreement, and if any seaman fails to render himself on board, or deserts, so that the ship proceeds to sea without him, he forfeits a sum equal to his advance wages over and besides such advance.[1] A Justice of the Peace may, upon complaint of the master, issue a warrant to apprehend a deserting seaman, and commit him to the house of correction or common jail, there to remain until the ship is ready to sail

[1] "That at the foot of every such contract there shall be a memorandum in writing, of the day and hour on which such seaman or mariner, who shall ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the log-book of such ship or vessel, of the name of such seaman or mariner, and shall, in like manner, note the time that he so neglected to render himself (after the time appointed), every such seaman or mariner shall forfeit, for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any Court, or before any Justice or Justices of any state, city, town, or county within the United States, which by the laws thereof have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage." Sec. 2 of the Act of 1790. See The Washington, Crabbe's R. 204.

on her voyage, and then cause him to be delivered to the master.[1] If a seaman absents himself without leave after the time agreed on to render himself on board, at the commencement of the voyage, he forfeits one day's pay for every hour of absence.[2] Upon this section of the statute, it has been held, that the mariner may prove a special indulgence granted by the master to be absent beyond the time specified in the articles, to rebut the proof made by the log-book.[3] The forfeitures denounced by the second section of the Act, it will be observed, are incurred for neglect or breach of duty in cases, which can only happen prior to the commencement of the voyage.[4]

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[1] "That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any Justice of the Peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such Justice; and if it shall then appear, by due proof, that he has signed a contract within the intent and meaning of this Act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said Justice shall commit him to the house of correction, or common jail of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner." Act U. S. 1790, ch. 56, sec. 7.

[2] Sect. 2, *ut supra*.

[3] Thompson v. Philadelphia, 1 Peter's Adm. R. 210; Cotel v. Hilliard, 4 Mass. R. 665; Curtis's Merchant Seamen, 141.

[4] Cotel v. Hilliard, *ut supra*.

21. The fifth section of the Act provides, that if any seaman who has signed the articles shall absent himself without leave, and a proper entry shall be made thereof in the log-book on the same day, if he returns to duty within forty-eight hours, he shall forfeit three days' pay for every day's absence, to be deducted out of his wages; if absent more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels on board of the ship, or in any store where they may have been lodged at the time of the desertion, and shall, moreover, pay all damages.[1] This section applies to the case of absence or desertion occurring after the commencement and during the continuance of the voyage.

[1] Sec. 5. "That if any seaman or mariner who shall have subscribed such contract as is hereinbefore described, shall absent himself from on board the ship or vessel, in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them, all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place; and such damages shall be recovered with costs, in any Court, or before any Justice or Justices, having jurisdiction of the recovery of debts, to the value of ten dollars or upwards."

22. In the construction of this section of the Act, it is held, that a proper entry in the log-book is indispensable evidence of a desertion, for which a forfeiture of wages is claimed. And it is not a proper entry simply that the seaman was absent. It must be also stated, whether it was with or without leave. Stating that the seaman left the ship is not sufficient. The entry must be made on the very day when the seaman absented himself from the ship. An entry on a subsequent day is not a compliance with the law. The entry must mention the name of the mariner against whom the forfeiture is to be enforced. It is not sufficient to say generally that the crew, or even that all the crew, were absent. And to incur the forfeiture there must be one continued absence of forty-eight hours.[1]

23. The fourth section of the Act provides, that if any person shall harbor, or secrete, any seaman or mariner, belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof, before any Court in the city, town, or county, where he, she, or they may reside, shall forfeit and pay ten dollars for every day which he, she, or they shall continue so to harbor or secrete such

[1] Flanders' Maritime Law, and authorities there cited. Where there is no entry in the log-book, of the absence of a seaman without leave, and he is received on board again, his wages cannot be forfeited under the Act of 20th July, 1790. The Otis, Crabbe's R. 52.

The law requires that the entry made in the log-book, of the absence of a seaman, shall show that it was without leave, in order that an innocent departure shall not afterwards be turned into a desertion. The Washington, Crabbe's R. 204.

seaman or mariner, one-half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage, for which such seaman or mariner engaged, shall be ended. The latter clause of this section being considered as in restraint of a general right, it has been held, that a seaman claiming its protection, is bound to produce the shipping paper, which is the best evidence of his belonging to the ship, and of the day he joined her; and that it is not enough, in order to let in other evidence, to show that the shipping paper is beyond the reach of the defendant, without showing that it is lost or destroyed.[1]

24. We may here observe, that by a subsequent Act, the provisions of the Act of 1790, are extended to seamen employed in the fisheries.[2] They are required, the same as merchant seamen, to enter into an agreement in writing, or in print, for their services; and in addition to such terms of shipment as may be agreed on, the same agreement is to express whether the same is to continue for one voyage, or for the fishing season, and also to express, that the fish, or the proceeds of such fishing voyage or voyages, which appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish, which they may respectively

[1] Reynard v. Brecknell, 4 Pick. R. 302.

[2] Act of June 19, 1813, ch. 2, sec. 1.

have caught; and the agreement to be countersigned by the owner or his agent.[1] The omission to enter into such an agreement in writing, or in print, is a forfeiture of the bounty allowed by the government on such voyages, and also of the other remedies prescribed by the Act in favor of the owner and fishermen.[2] Any neglect or refusal of duty, or resistance of just commands, subjects the offender to an action for damages, and also forfeits to the use of the owner the government bounty.[3]

25. Whatever may be the common custom, or the law of the United States, in regard to bounty, it is competent for the owners of a fishing-vessel to engage men at wages, to navigate the vessel, and take fish for their account. And when one of the owners of a fishing-vessel acts as master, and the others do not interfere, he must be deemed agent for the owners; the contract enures to their use, and binds them jointly. And if it appears that a seaman, who contracted for wages on a fishing voyage, was induced, by fraudulent misrepresentations, to sign shipping articles, by which he would receive a share of the fish as his compensation, the prior contract remains unaffected by the articles.[4]

26. We have endeavored, in the preceding sections, to bring together, in convenient form, the statutory provisions which relate directly or indirectly

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[1] Act of June 19, 1813, ch. 2, sec. 1.

[2] Ibid. and sec. 2; Act of 1816, ch. 14.

[3] Sec. 1, of Act of 1813, *supra*.

[4] Baker v. Corey, 19 Pick. R. 496.

to the contracts of seamen. Those which provide especially for the conduct of seamen after the contract is signed, particularly as to their rendering themselves on board at the appointed time, and fixing the penalty of absence, do not directly concern the shipping articles; but as the duties of the seamen have their inception upon the execution of the articles, I have thought it proper to state, in this place, the positive provisions of law, with respect to the violation of those duties. We shall now proceed to examine those Acts of Congress which have provided for the protection of seamen; and this leads us to consider the second division of our subject.

### II. OF THE SEAWORTHINESS OF THE VESSEL.

27. The cupidity or recklessness of owners might induce them to send their vessels to sea in a condition to jeopard the lives of the crew. To prevent this, Congress has wisely placed the guardianship of their safety and security in the hands of the seamen themselves. The Act of 1790 provides, that if a ship bound on a foreign voyage, after the voyage is begun, and before leaving the land, is found too leaky, or otherwise unfit to proceed on the voyage in her crew or equipments, the mate, or first officer, and a majority of the crew, may require the ship to stop at the first convenient port, and have the ship surveyed; and, if necessary, fully equipped and repaired, under the direction of the District Judge or a Justice of the Peace.[1]

[1] Sec. 3. "That if the mate, or first officer under the master, and a majority of the crew of any ship or vessel, bound on a

28. By the general maritime law, the master impliedly agrees, that at the commencement of a voyage,

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voyage to any foreign port, shall, after the voyage is begun (and before the ship or vessel shall have left the land) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall, upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place where such inquiry can be made, and shall then apply to the Judge of the District Court, if he shall there reside, or if not, to some Justice of the Peace of the city, town, or place, taking with him two or more of the said crew who shall have made such request; and thereupon such Judge or Justice is hereby authorized and required to issue his precept, directed to three persons in the neighborhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same, in respect to the defects and insufficiencies complained of, and to make report to him, the said Judge or Justice, in writing, under their hands, or the hands of two of them, whether in any or in what respect, the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel, will be necessary; and upon such report, the said Judge or Justice shall adjudge and determine, and shall endorse on the said report his judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made, or deficiencies supplied, where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report, and judgment, to be taxed and allowed on a fair copy thereof, certified by the said Judge or Justice. But if the complaint of the said crew shall appear, upon the said report and judgment, to have been without foundation, then the said master, or the owner or

the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be found seaworthy, and that the mariners shall be supplied with good and sufficient provisions whilst they are in his service. It may not be either necessary or proper, that the owner or master should exhibit to the mariners he engages a list of the stores, and take their opinion whether they are sufficient or not. But they are bound to see that the vessel is in fact seaworthy. This is the obligation imposed upon them by the maritime law. If it is not seaworthy, and the mariners make com-

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assignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said Judge or Justice) out of the wages growing due to the complaining seamen or mariners. And if, after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs, or alterations, as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any Justice of the Peace to commit, by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common jail of the county, there to remain without bail or mainprize, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said Justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of *habeas corpus*, or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment, or other previous proceedings: Provided, That sufficient matter shall be made to appear, upon the return of such *habeas corpus* and an examination then to be had, to detain him for the causes hereinbefore assigned." Act U. S. 20th July, 1790.

plaint at the commencement of the voyage, whilst it is in the power of the master to procure the requisite stores, and he refuses to do so, they may leave the ship.[1]

29. But if the ship proceeds to sea, the mariners are bound to protect her, through all perils; and their entire possible service, for this purpose, is pledged to that extent, notwithstanding deficiencies may then occur or be discovered.[2] If, however, the ship is clearly unseaworthy and unfit for the voyage, the mariners are fully justified in insisting upon her return home; and they are guilty of no offence, if they do so. The law deems the lives of all persons far more valuable than any property; and will not permit a master, under cover of his acknowledged authority on board of the ship, from rashness or passion or ignorance, to hazard the lives of the crew in a crazy ship, or compel them to encounter risks and perform duties which are so imminent and overwhelming, that they can escape only by the most extraordinary chances, and, as it were, by miraculous exertions.

30. The proposition cannot for a moment be maintained, that the crew are bound to proceed on the voyage in an unseaworthy and rotten ship, at the imminent hazard of their lives, merely because the master and officers choose, in their rashness of

[1] Dixon v. The Cyrus, Peters' Adm. R. 407; U. S. v. Staly, 1 W. & M. 338.

[2] Ibid.; The Neptune, 1 Hagg. 236; The Nimrod, Ware's R. 1; U. S. v. Staly, *supra*.

judgment, to proceed. It is true, that in all cases of doubt, the judgment of the master and officers ought to have great weight; and from their superior intelligence, ability, and skill, it may be relied on with far more confidence than that of the crew. Still, if the case does occur; if they will insist on proceeding, no matter at what hazard to life, and the ship is unseaworthy, the crew have a right to resist and refuse obedience. It is a case of justifiable self-defence against an undue exercise of power. On the other hand, if it should appear beyond reasonable doubt, that the ship was clearly seaworthy, the seamen, by compelling the master to return to port, are guilty of the offence "of an endeavor to commit a revolt." But if they act *bonâ fide*, and upon reasonable grounds and apparent unseaworthiness, and it is doubtful whether the vessel be unseaworthy or not, it is a sufficient defence to an indictment for that offence.[1]

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[1] U. S. v. Ashton, 2 Sum. R. 13; Porter v. Andrews, 9 Johns. R. 350; The Nimrod, *ut supra*; Curtis's Merchant Seamen, pp. 23, 24. "In the case of Dixon v. The Cyrus, Judge Peters intimated," says Mr. Curtis, "that when the vessel is at sea, no defect then discovered, and nothing but an absolute inability of the ship—meaning, I presume, a state of things amounting to wreck—will justify the seamen in quitting her: and this is undoubtedly true, because it is implied in that principle of law which binds the seamen to the vessel through all perils at sea. But where the vessel is in a foreign port, after having sailed on the outward voyage, whether a domestic or foreign port, and unseaworthiness of a dangerous character occurs through damage received after sailing, can the seamen, upon principles of the general maritime law, be compelled to proceed again to sea, the master refusing, or not having the means, to make the proper repairs? Upon principle, it seems to me very clear that they

31. The Act of Congress, therefore, it will be perceived, does not create the obligation of the owner and master to have the ship in a seaworthy condition, but only provides the mode of procedure, on the part of the mariners, when it is discovered not to be in such condition. The discovery and consequent proceedings, however, must take place after the voyage has begun, and before the vessel has left the land.[1]

32. A recent Act provides for the mode of proce-

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cannot be bound to proceed. The Statute of 1790 includes, among the causes for a survey before the vessel leaves on her outward voyage, a deficiency of provisions; and Lord Stowell once held, that a serious deficiency of provisions, while in an outward port, justified what otherwise would have been a desertion. The same high authority also justified a desertion on the ground that the master had altered the shipping articles in a foreign port. *A fortiori*, it would seem, must a dangerous deficiency in the vessel itself, in port, discharge the mariner's contract, if, on a fair remonstrance, the master does not make the necessary repairs; for it can never be required by such a system as the maritime law, that this contract should imply an obligation on the part of the seamen to expose their lives to perils directly referable to the negligence of the owner or master, when the vessel is not at sea." See also the case of U. S. v. Staly, *ut supra*.

[1] In the case of Porter v. Andrews, *supra*, the vessel, after her departure, sprung aleak, and put back for repairs, which were voluntarily made by the owners, without any proceedings being had by the crew according to the third section of the Act of Congress. The seamen, upon the repairs being completed, refused to go on board again, upon the ground that the repairs were insufficient. But it was held, that the seamen were bound to return on board, it not appearing that the vessel was in fact unseaworthy; and therefore, not having done so, they were not entitled to any wages. If they meant to insist on their rights under the Act of Congress, they should have instituted the proper proceedings.

dure, in a case of unseaworthiness, in a foreign port.[1] If the first officer, or the second and third officers, and majority of the crew of any vessel, shall make complaint in writing that she is in an unsuitable condition to go to sea, because she is leaky, or insufficiently supplied with sails, rigging, anchors, or any other equipment, or that the crew is insufficient to man her, or that her provisions, stores, and supplies, are not, or have not been during the voyage, sufficient and wholesome; thereupon, in all such cases, the consul, or commercial agent who may discharge any duties of a consul, shall appoint two disinterested, competent, practical men, acquainted with maritime affairs, to examine into the causes of complaint, who shall, in their report, state what defects and deficiencies, if any, they find to be well founded, as well as what, in their judgment, ought to be done to put the vessel in order for the continuance of her voyage.[2]

33. The inspectors are empowered to examine the vessel, and whatever is aboard of her, as far as is pertinent to their inquiry, and to hear and receive any other proofs which the ends of justice may require. Upon receiving their report, the consul, or commercial agent, may approve the whole, or any

[1] Act of July 20th, 1840; see Knowlton v. Boss, 12 Law Rep. 13, as to rights of seamen under this Act, and Hart v. The Otis, Crabbe's R. 52.

[2] Ibid. sec. 12. Amended by sec. 6, of the Act of July 29, 1850, so that all complaints in writing to the consuls, or commercial agents, as therein provided, that a vessel is unseaworthy, shall be signed by *the first or the second and third officers*, &c., instead of by "any officer," as provided in sec. 12, of the Act of 1840.

part of it, and upon so doing, is bound to certify such approval, and if he dissents, he must certify his reason for dissenting.[1]

34. The inspectors must also state in their report, whether, in their opinion, the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, and in case it was by neglect or design, and the consul or commercial agent approves of such finding, he is required to discharge such of the crew as desire it, each of whom is entitled to three months' pay in addition to his wages to the time of discharge. On the other hand, if, in the opinion of the inspectors, the defects or deficiencies found to exist, have been the result of mistake or accident, and would not, in the exercise of ordinary care, have been known and provided against before the sailing of the vessel, and the master, in a reasonable time, removes or remedies the causes of complaint, then the crew are bound to remain and discharge their duty; otherwise they shall, upon their request, be discharged, and receive each one month's wages in addition to the pay up to the time of discharge.[2]

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[1] Ibid. (Act of 1840), sec. 13.

[2] Ibid. sec. 14. The fifteenth section of the Act provides, that the master shall pay all such reasonable charges in the premises as shall be officially certified to him under the hand of the consul, or other commercial agent; but in case the inspectors report that the complaint is without any good and sufficient cause, the master may retain from the wages of the complainants, in proportion to the pay of each, the amount of such charges, with such reasonable damages for detention on that account, as the

35. By the Act of 1845, the commanding officer of any vessel, squadron, or fleet of the Navy of the United States, when upon the high seas, or in any foreign port where there is no resident consul of the United States, is authorized and empowered to exercise all the powers of a consul in relation to mariners of the United States.

### III. OF THE SUPPLIES REQUISITE TO BE PUT ON BOARD.

36. To insure the comfort of seamen, and regulate the general duty of the master and owners, Congress has provided that every ship bound on a voyage across the Atlantic Ocean, shall at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board, over and besides such other provisions, stores, and live stock, as shall

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consul, or other commercial agent, directing the inquiry, may officially certify.

The sixteenth section provides, that the crew of any vessel shall have the fullest liberty to lay their complaints before the consul, or commercial agent, in any foreign port, and shall in no respect be restrained or hindered therein by the master, or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul, or commercial agent, it shall be the duty of the master to acquaint him with it forthwith; stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon it shall be the duty of such consul, or commercial agent, to repair on board and inquire into the causes of the complaint, and to proceed thereon as this Act directs.

by the master and passengers be put on board; and in like proportion for shorter or longer voyages. And in case the crew of any ship not so provided, shall be put on short allowance in water, flesh, or bread, during the voyage, the master or owner shall pay to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to that allowance, to be recovered in the same manner as their stipulated wages.[1]

37. The words, "for longer or shorter voyages," are intended to extend the provisions of the law to all other voyages. The Act is not exclusively confined to voyages across the Atlantic Ocean, but relates to all other voyages in proportion to their duration.[2] It applies also as well to seamen shipped in foreign ports as to seamen engaged in the United States.[3]

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[1] That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic Ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores, and live stock, as shall, by the master or passengers, be put on board; and in like proportion for shorter or longer voyages. And in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel, shall pay to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to that allowance, to be recovered in the same manner as their stipulated wages. Act U. S. 20th July, 1790, ch. 56, sec. 9.

[2] Curtis's Merchant Seamen, p. 103.

[3] Gardner v. The Ship New Jersey, 1 Peters' Ad. R. 223.

38. To establish a claim to extra wages under this Act, it must appear that there was negligence in the master or owner, in not furnishing the ship before her departure from the port, with the quantity and species of provisions and water, required by law. They are not answerable for accidents happening to them, without negligence on their part.[1] Hence, when a vessel happens to be in a port where it is not in the power of the master to obtain provisions of the amount and description directed by the law, other articles may be substituted which are of equivalent value. The law does not require impossibilities.[2]

39. When the crew are put upon an allowance, and there is a controversy whether it be short or not, the navy ration is assumed as the standard of a proper allowance. It by no means follows that because the provisions on board, whether of the required quantity or not, are dealt out in fixed and limited quantities, that the men are put on short allowance. It is the duty of the master, in all cases, whether the provisions be scanty or abundant, to oversee and regulate their expenditure. And it must be shown that the allowance he prescribes, is not in a reasonable amount, not enough for the ordinary consumption of man. As a seaman in the merchant service requires as much food as one in the navy, the navy ration has therefore been assumed as the standard

[1] The Ship Washington, Id. 219; The Barque Talent, Crabbe's R. 216. There must be both a deficiency of provisions and a short allowance in order to claim extra wages.

[2] Ibid. The Mary, Ware's R. 459. But see the brig Harriot, Bee's Ad. R. 80.

by which the allowance in the merchant service ought to be regulated.[1]

40. If the master, upon falling in with another vessel at sea in distress, supplies her with provisions, and is thus compelled to put his own crew on short allowance, he would not, upon any principle of justice or sound policy, be liable to the statute penalty of extra wages. And we cannot perceive that he would incur the liability, even if he should receive from the distressed ship, compensation for the provisions. He is bound by every sentiment of humanity to relieve the distressed. It is an obligation thrown upon him by the law of nature, and recognised by the law of man. In doing so, he deprives himself of the means of giving to the seamen their full allowance. The compensation which he receives, does not enable him to supply the ship with the provisions with which he has parted. So that it is immaterial to the seamen whether he receives compensation or not. Besides, he complies with the requirement of the statute. When the ship sails, she is supplied with the requisite quantity of provisions. During the voyage, under the compulsion of law, at the imperative call of humanity and duty, he relieves the necessities of a suffering ship, and is

[1] The Mary, supra. Mr. Curtis (Merchant Seamen, p. 105) propounds this query: "In the case of a vessel going to a port voluntarily, where bread, it is known, cannot ordinarily be obtained, would it not be *gross negligence* in the master not to take a full supply of bread at the port of departure? Impossibility in such cases cannot apply as an excuse, when it ought to have been foreseen and provided against." This is undoubtedly the correct view of the subject.

thus compelled to put his own crew upon short allowance. By so doing he certainly incurs no penalty, even if he is paid for the provisions. All that could, with any show of reason, be demanded of him in such a case, would be compensation for the difference in value, between the short allowance and the customary ration, or a division among the crew of the sum which he received.[1]

### IV. OF THE MEDICINE CHEST.

41. As the law formerly stood, and still stands in the general maritime law, a seaman when he received any injury while in the service of the ship, or became sick during the voyage, and the sickness was not occasioned by his own fault, was entitled to be cured at the expense of the vessel. The whole expense of his sickness, that for medical advice and attendance, as well as other expenses, whether he remained on board or was put on shore, was a charge on the ship. This principle, which makes the expenses of the sickness of any of the crew a charge on the vessel, is adopted as customary law, or incorporated in their maritime codes by nearly every nation of Europe. It has been established among the usages and customs of the sea, from the earliest epoch to which can be traced the elements of the existing maritime law of the great commercial commonwealth

[1] Vide Curtis's Merchant Seamen, pp. 103, 104. To justify a seaman in leaving his ship in a foreign port, because of the bad provisions supplied, the case must be very clear in point of fact, and the provisions must be not merely not of the best, but positively bad and unfit for the men's support. The Washington, Crabbe's R. 204.

of Christendom. It is found in nearly all those early digests of maritime law, which in various places were made for the regulation and government of maritime commerce during the middle ages. It is not questioned that this ancient principle has been adopted as part of the maritime law of this country.[1]

42. It is provided by Act of Congress[2] that every ship or vessel, belonging to a citizen or citizens of the United States, of the burden of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once, at least, in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, at

[1] The Forest, Ware's R. 421; Harden v. Gordon, 2 Mason's R. 541; Lamson v. Westcott, 1 Sum. 150, 595; The Ship Neptune, 1 Peters' Ad. R. 152; Id. 256; Reed v. Canfield, 1 Sum. 195; The Brig George, Id. 151.

[2] Act of July 20th, 1790, sec. 8. The provisions of this statute by the Act of March 2, 1805, are extended to vessels of seventy-five tons or upwards, navigated with six persons, or more, in the whole, bound from the United States to any port or ports in the West Indies.

every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

43. The question here arises, whether the Act of Congress which we have recited, was intended as a benefit to the mariner or as a measure of relief to the ship-owner; a deprivation to the mariner of an advantage, which the law before allowed him, or an additional security for his health and comfort. "The latter is certainly the inference which would naturally arise from the terms in which the law is expressed. It imposes on owners a new obligation, to which they were not subject by the maritime law, without liberating them in its terms from any liabilities to which they were subject before. And it professedly subjects the master, within the range of whose peculiar duty it would be to see that the law is complied with, to a personal liability in case it is not; to which it may have been doubted whether he was subject by the general maritime law. For though there could be no doubt of the liability of the master for wages upon the ground of the contract, it might not have been deemed so certain that he was liable for the extraordinary expense of sickness of the crew, a liability not resulting from the terms of the contract, but imposed on the owners by the policy of the law."[1]

[1] Ware, J. in the case of The Forest, Ware's R. 420, 422. See also, to the same effect, Harden v. Gordon, 2 Mason's R. 541. But see Holmes v. Hutchinson, Gilpin's R. 447.

44. But however strong the argument in favor of the construction of the statute that we have here mentioned may be, a contrary construction was early adopted, and the owners have been held exempt from their liability for medical advice and attendance, in case a medicine chest was provided in compliance with the law. To this extent the Act has been held to be an implied repeal of the pre-existing law. The medicine chest, with the directions for the use of the medicine, is held to be a substitute for the advice of a physician. But even upon this construction of the statute, great doubts have been expressed whether it ought to be extended to exempt the owners from the charge for medical advice in cases of dangerous and malignant disease.[1]

45. And it has been expressly held that the Act is inapplicable to cases, where the seamen are sent on shore for the safety or convenience of the ship, whether with or without their consent, if they do not draw their medicine from the chest, or use the medical directions, and in all such cases the maritime law remains in full force.[2] "The regulation of

[1] The Forest, Ware's R. 423.

[2] Harden v. Gordon, supra, 1 Sum. 150, 495; 1 Peters' Ad. R. 256. In the case of The Brig George, 1 Sum. 153, Judge Story, referring to the case of Harden v. Gordon, says: "I had then and continue to have great doubt, whether the Act of Congress ought to have been allowed to have any operation as an exception out of the maritime law, and whether the provision for a proper medicine chest was not merely directory, and the omission made penal upon the master personally, without the slightest intention on the part of Congress to interfere with the general duties and responsibilities of the owners, created by the maritime law."

the statute is limited to the ordinary cases of illness on board the ship, a sickness of such a character that the patient may be and is kept on board, and receives, or may receive, the benefit of the medicine chest, and the directions, and the advice and assistance of the master of the ship, or some other competent person attached to the ship, in the application of the medical directions accompanying the chest, and such nursing and attendance as the situation of the ship may admit."

46. "When the circumstances of the case, and especially the hazard arising from a malignant and contagious disorder, render it necessary or expedient to put the patient on shore, not merely for his greater benefit, but for the general interest of the voyage, there is presented a case which is not within the fair meaning of the statute, and must be governed by the general principles of maritime law applicable to the circumstances of the case. There is a class of cases that might be mentioned, coming within the general aspect of the law, and yet not within its fair intent. Such are the cases requiring surgical skill and assistance, a dislocation or a fracture, in which the medicine chest and its directions, with all the assistance and intelligence of the master, or of any one belonging to the ship, would be of no avail. Such disasters are not unfrequent in the various manœuvres on board a ship. That the unfortunate subject of them shall be cured at the expense of the ship is expressly provided in all the marine codes, old and new, and in a distinct article from the provisions respecting seamen falling sick. It may be reasonably doubted,

whether it was intended to repeal the general law on this subject, in such a contingency, by the provision respecting a medicine chest, from which, from the nature of the case supposed, the sufferer could have no relief."[1]

47. To exempt the owners, then, from the charge for medical advice and attendance, it must appear not only that the chest of medicines with proper directions for their use was provided, but also that the seamen had the benefit of the medicine, administered under the printed directions for its use by the master, or some other person fit to be intrusted with so delicate a duty. If the medicine chest is inaccessible to the seamen, it is the same thing to them as though none were provided. If the medicine chest is deemed by the law a substitute and an equivalent for the advice of a physician, it can only be so when the seaman can have the use of it, safely and properly administered. He does not have the advantage of the medicine, when there is no person on board by whom it can be administered, or what amounts to the same thing, no person of such intelligence and discretion, that it would be safe to intrust him with a duty of so much delicacy and responsibility. There would be no safety in sending a common sailor to the medicine chest, with the printed directions, to serve out medicine to a patient laboring under a disease of such violence for example as the yellow fever.

[1] Davis, J. in The Ship George, 1 Sum. 595. See also Holmes v. Hutchinson, 1 Gilpin's R. 447; Curtis's Merchant Seamen, pp. 113, 115; Harden v. Gordon, 2 Mason's R. 541.

48. Therefore, in all cases where the seaman cannot have the benefit of the medicine, whether it be because he is removed ashore, or because there is no one on board the vessel by whom the medicine can be safely administered, the expense of medical advice must be at the charge of the ship.[1] But in the case

[1] The Forest, Ware's R. 420. In this case, the master, mate, and four of the seamen, were sick with the yellow fever at the same time. Judge Ware justly considered that in so malignant a disease, where there would be no safety in sending a common sailor to the medicine chest with the printed directions, to serve out the medicines, the benefits of the medicine chest and the directions were really inaccessible to the mariner, and could not, therefore, be held to answer the purpose of a substitute for regular medical advice, if that is to be regarded as the purpose of the statute. But suppose the disease, whether infectious or not, is of such dangerous character that neither the master, however intelligent, nor any other person on board, can with safety administer the medicine provided by the ship, is not the medicine chest in such a case as really inaccessible to the seaman as in a case where the master and mate being sick, there is no one on board but a common sailor to administer the medicines? But see *contra*, Pray v. Stinson, 21 Maine R. 402.

In the case of Holmes v. Hutchinson, Gilpin's R. 447, Judge Hopkinson comments at length upon the remarks made by Judge Peters in the cases of Walton v. The Neptune, and Hastings v. The Happy Return (Peters' R. 152, 256). In the latter case, Judge Peters says: "When one of a crew is seized with an infectious disease, he should be removed from the rest and put on shore at the ship's expense, for the safety of the whole and the advantage of the owner, who must count on extra disbursements if he will trade to ports or places liable to such casualties." He adds, that it ought to be borne by the ship, "from motives both of humanity and justice." Judge Hopkinson quotes this language, and observes: "This is well when the sick man is taken from the ship for the safety of the crew and the advantage of the owner, but I do not feel the force of any claim on the part of the seaman, because the vessel is trading to a port or place liable to dangerous

of an ordinary sickness, not infectious or dangerous to the crew, so as to render a removal from the ship prudent or necessary, and when no such removal is made, and the ship is provided with a medicine chest, according to the directions of the Act of Congress, the medical advice of the sick seaman is not chargeable to the ship.[1] And the same result follows when the seaman is taken on shore at his own solicitation, it not being for the convenience of the ship, and

diseases. This he knew when he made his contract, and if it exposed him to extra expenses, as well as risk, it may be presumed that he took them into his calculation in fixing the price of his services, the amount of his wages. In this way, the owner has paid extra disbursements for this danger and these expenses. We shall have a very uncertain rule, if the legality of this charge upon the owners of a vessel is to be governed or regulated by the healthiness of the trade in which she may be employed, or the places to which she may go. In the conclusion of the Judge's observations, he says: "Although, in ordinary cases, having a medicine chest on board may be a compliance with the Act of Congress, exceptions should be made where dangerous diseases require and compel extraordinary remedies and expense." By dangerous diseases we must understand such as had been previously mentioned by the Judge—that is, infectious diseases, dangerous to the rest of the crew, and not merely dangerous to the person afflicted; for in the latter sense every disease might be included, according to its violence and the constitution of the patient. "It will hardly do for judicial tribunals to take upon themselves to establish one invariable rule for the treatment of a sick seaman sinking under an infectious or other disease, instead of leaving it to be determined, according to the circumstances attending such case, by those to whom the law has intrusted that duty. There may be ports and places in which it would be most inhuman to remove a seaman, seized with an infectious disease, on shore." Pray v. Stinson, 21 Maine, 407.

[1] Holmes v. Hutchinson, Gilpin's R. 447.

the ship being properly provided with a medicine chest.[1]

49. In the case of Pray v. Stinson,[2] it was held, that when it is a proper case for medical advice, and a physician is called, because the danger is such that the laws of the place, as well as the feelings of humanity, require that he should be, the law will imply a promise from him who has received the benefit of the services, to pay for them. And if in such a case, by the laws of the port, the physician's bill must be paid by the vessel before she can leave the port, the amount must be considered as paid for the seaman, and therefore liable to be deducted from his wages. The vessel is regarded by the maritime law as the seaman's debtor, and the account is to be adjusted between them, by considering what she has paid for his use, which will go, *pro tanto*, to extinguish his claim.[3]

50. A mate succeeding to the command of the ship upon the death or disability of the master, is entitled to be cured at the expense of the ship in the same manner as a seaman. And hence, if he is put on shore from sickness for the convenience of the ship, his expenses for medicines, advice, attendance, and board, are to be borne by the ship-owner. In the case of The Brig George,[4] Judge Story expressed

[1] Pierce v. Patton, Gilpin's R. 435; see also Pray v. Stinson, 21 Maine, 402.

[2] 21 Maine R. 402; vide also Holmes v. Hutchinson, *supra*.

[3] Ibid.

[4] 1 Sum. R. 151.

the opinion that the master is entitled to be cured at the expense of the ship. He could perceive no difference between the case of the master and the case of any of the other officers, or crew of the ship. The interest of the ship-owner, he said, is equally promoted in each case by a speedy recovery and return to duty; and the benefit is even of a higher nature, both for the ship and the voyage. The superintending care and control of the ship's concerns, is of the last importance to the interests of the owner.

51. He did not, however, directly decide the point, for he held in the case before him, that the mate assuming the duties of master, did not thereby become actually master. He did not cease to be mate, but the law threw upon him cumulatively the duties of master. "He was still a mate, acting as master; not master, but *quasi* master, with the same general powers and responsibilities *pro hac vice*."[1] It is rather difficult to see how a subordinate person, elevated by the mandate, as it were, of the law, to the chief command of the vessel, with all the powers and duties of the office thrown upon him, can be deemed otherwise than as master. If he exercised the powers of master *pro tempore* by appointment of the ship-owner, would not the law deem him to all intents the master, subject to all the advantages and disabilities, if any there be, belonging to that position? How then is the result changed, if he exer-

[1] Ibid.

cises those powers *pro tempore* by appointment of the law?

52. The seaman is to be cured for injuries and sickness occurring while he is in the ship's service. It is the benefit from the service which constitutes the groundwork of the claim. And there is no distinction, in principle, between a service in a foreign and home port. The maritime law embraces all sickness, and all injuries, sustained in the service of the ship, and while the party constitutes one of her crew, without in the slightest manner alluding to any difference between their occurring in a home or in a foreign port, upon the ocean, or upon tide waters.[2] The owners, to exempt themselves from the charge for medical advice, must prove a compliance with the statute, namely, that a medicine chest was on board, furnished with suitable medicines. And for this purpose, the master is not a competent witness. Whenever the sufficiency of the medicine chest is called in question, the proof required would be the testimony of some respectable physician who had examined it.[3]

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[1] But see *contra* Reed v. Chapman, 2 Strange R. 937; The Favorite, 2 Rob. Ad. R. 232; The Brig George, 1 Sum. R. 151.

[2] Reed v. Canfield, 1 Sum. R. 195.

[3] The Nimrod, Ware's R. 9; The William Harris, Ibid. 367. In case of sickness by his own fault, the seaman is not entitled to his wages during the time he does not do duty, and is liable for the expenses of his subsistence; but not for the wages paid another man in his place. Johnson v. Huckins, 6 Law R. 311.

## CHAPTER III.

### OF THE MASTER'S AUTHORITY OVER THE MARINERS.

53. In all that is said under this head, of the master's authority over the seamen, it must be understood that by the statute law of the United States, the power of corporal punishment, or punishment by flogging, is done away. The general right of inflicting punishment, however, upon an offending seaman, remains. It exists under the general maritime law. The Act of Congress has only abolished a particular mode of punishment.[1]

54. The authority of the master of a vessel over his ship's crew, while it bears a certain analogy to that of a parent and schoolmaster, stands upon very different reasons, and is allowed for very different purposes. The discipline of a parent has relation to the whole life of the child, and his future well-being. That of a captain relates to the voyage only. The service in which he is employed is one of uncommon peril, not only requiring great skill, but often demanding great promptitude of decision and action,

[1] Act of Sept. 28, 1850. "Provided, That flogging in the navy, and on board vessels of commerce, be, and the same is hereby abolished from and after the passage of this Act."

and admitting no time of delay for deliberation, reasoning, or expostulation. Upon him is imposed the obligation to meet and provide for these emergencies, and if there is not an instantaneous obedience to his orders, it may involve the loss of the ship and all who are in it.

55. The law invests him, therefore, with the absolute power of command, and clothes him with all the authority which is necessary to enforce prompt obedience to his orders. The office of master is also one of great personal responsibility. He is answerable to those who have intrusted their property to his care, for losses and damages which may happen, not only from his own personal faults or neglect, but for such as arise from the negligence or unfaithfulness of the men whom he employs. The law having rendered him responsible for the negligence and misconduct of his men, has given him a large discretionary authority to correct such misconduct in a summary manner; and as the general security of the vessel and cargo depends upon the general fidelity of the crew and the promptitude of their obedience, it authorizes the master to enforce that fidelity and punctuality, by the ministration of punishment, when it becomes necessary for the maintenance of good discipline.[1] The authority of the master over the mariner, is in no just sense of a military character. It is entirely civil in its nature.[2]

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[1] Bangs v. Little, Ware's R. 510; Ware, J. U. S. v. Alden, 7 Law R. 469.

[2] U. S. v. Hunt, 2 Story, C. C. R. 129.

56. He possesses in extreme cases, such as a dangerous mutiny, the power perhaps to take life, or rather he may be justified in that extreme measure. But for simple disobedience of orders, he must not use a mode of punishment that would be permanently injurious to the health or constitution of the seaman upon whom it is inflicted.[1]

57. When the propriety and legality of correction of some kind is made to appear, the burden of proof then rests upon the complaining seaman, to show that the punishment, under all the circumstances of the case, was clearly excessive. For the law has not prescribed any precise or exact measure of punishment. The general formulary of expression is, that the punishment must be moderate and reasonable. But in determining the question of moderation and reasonableness, a court of justice will concede something to the excitement of the occasion under which the master acts, allow some consideration to the general character and temper of the man who is the subject of punishment, some latitude for differences of judgment, and will presume something in favor of a rightful and proper exercise of discretion.[2]

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[1] U. S. v. Alden, *supra*.

[2] Butler v. McLellan, Ware's R. 219; United States v. Freeman, 4 Mason, 512. "It is doubtless true," said Judge Story in this case, "that the master has a right to require of them (the crew) a prompt and ready performance of duty, and an habitual obedience to reasonable commands at all times. The safety of the ship and the success of the voyage, essentially depend upon the due enforcement of this right. And in proportion as the urgency of the occasion and the necessities of the sea service, require instant compliance with such commands, the duty of the

58. It should be here observed, that in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and, therefore, that the party charged should have the benefit of that rule of universal justice, of being heard in his own defence. A punishment inflicted without the allowance of such benefit, is in itself a gross violation of justice. There are cases, undoubtedly, which neither require nor admit of such a deliberate procedure. Such are cases where the criminal

seaman to obey becomes more pressing and obligatory. If obedience does not follow, the master may compel it by punishment, and the nature and extent of the punishment must be decided by the exigency of the case. The master may also apply punishment, by way of correction, for past as well as present offences, to preserve the good order and discipline of the ship. But after all, however summary or strict may be his power, it is not unlimited, nor is it to be exercised in an arbitrary, cruel, or revengeful manner. The authority of the master on board the ship, is nearly allied to that of a parent, and is to be used with reasonable tenderness and humanity. No punishment can be inflicted unless for reasonable provocation or cause; and it must be moderate, and just, and proportionate to the nature and aggravation of the offence. The law does not permit the master to gratify a brutal and low revenge, or to inflict cruel and unnecessary punishments. It allows no excess, either in the mode, or the nature, or the object of the punishment. It upholds the exercise of the authority only when it is for salutary purposes, not when it arises from personal prejudice, caprice, or dislike, or from gross and vindictive passions. In every case, therefore, where punishment is applied, the master is responsible, both civilly and criminally, if he wantonly exceed the measure of justice." See also Michaelson v. Denison, 3 Day's Rep. 294; Thorne v. White, 1 Peters' Ad. R. 168; 2 Id. 420; U. S. v. Smith, 3 Wash. C. C. R. 525; Turner's case, Ware's R. 83; Id. 53; The Agincourt, 1 Hagg. Ad. R. 271; Lowther Castle, Id. 384; Forbes v. Parsons, Crabbe's R. 283.

facts expose themselves to general notoriety by the public manner in which they are committed, or where the necessity occurs of immediately opposing attempted acts of violence by a prompt reaction of lawful force, as in the disorders of a commencing mutiny; these are cases that speak for themselves, and are of unavoidable dispensation.[1]

59. It is also proper to observe in this place, that a Court of Admiralty, in estimating the defence of the master to a cause of damage, will give little weight to charges of misconduct of a different nature from that which is charged as the justification of the punishment complained of. An act of theft will not prove a habit of drunkenness; if an act of mutiny is charged, it should be mutinous conduct of a former date that alone can be invoked with propriety to aggravate the charge of a mutinous disposition. The antecedent acts which are charged in justification, must be allied in nature to the act which is the immediate occasion of the punishment.[2]

60. A Court of Admiralty will presume in favor of the rightful exercise of authority, if the punishment is inflicted with calmness and deliberation, but the master will be deprived of that presumption, if the manner and the occasion savor strongly of passion. When that is shown, the Court will look with the

[1] The Agincourt, *supra*. It is contrary to every principle of justice for a captain to condemn and punish a seaman the moment he is complained of by the mate, and without any investigation. Schelter v. York, Crabbe's R. 449.

[2] Ibid.

most jealous scrutiny into the justification alleged. If in the infliction of merited punishment on a seaman, unnecessary and unwarrantable severity is used, and an injury is done beyond what was intended, though happening partly from misadventure, the authors of it will be held answerable, if not for vindictive damages, at all events for actual pecuniary damages, such as the expense of cure and loss of time occasioned by the injury.[2]

61. When the crime of a sailor is too great for the master's authority to punish, the master and his officers should seize the criminal, put him in irons, or otherwise safely secure him, and not take the law into their own hands, but bring him to justice on their return.[3] The law does not restrict the master's authority to personal chastisement, but he may confine an offending seaman on board the ship.[4]

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[1] Morris v. Cornell, 6 Law Rep. 304.

[2] Elwell v. Martin, Ware's R. 53.

[3] Thorne v. White, 1 Peters' Ad. R. 172.

[4] Ibid. Wilson v. The Mary, 1 Gilpin's R. 31; Joy v. Almy, 1 W. & M. 262. "The master," said Judge Hopkinson, in the case of The Mary, *supra*, "may confine on board the ship a refractory sailor; he may stop his provisions; he may inflict reasonable personal correction, according to the enormity of the offence and the obstinacy of the offender; and, if he be incorrigibly disobedient or mutinous, he may discharge him, and withal he incurs a forfeiture of his wages."

"In a case wherein confinement on board the ship of two disobedient seamen appeared to me proper and indispensable, and where frequent endeavors to reclaim were ineffectually tried, for almost the whole latter section of the return voyage, I held the confinement in irons so justifiable and necessary for the safety of the ship, that I refused to allow wages for that part of the voyage.

62. But whatever the mode of correction, it must be recollected that the law frowns upon all punishments which are unusual or unjust. It countenances punishment, but not cruelty. It has been doubted whether the master may confine a seaman for any cause, in a prison or guard-ship at a foreign port. There are certainly grave objections to such a procedure. "Many seamen have perished by diseases and hardships, to which they were subjected in loathsome prisons or infected ships; more have been rendered wretched and incapable of further service by chronic diseases, or the consequences of acute disorders."[1]

63. But as a measure of precaution, the law does authorize imprisonment on shore in a foreign port. The authority arises, and can be exercised only in cases of flagrant offences, where there is a positive necessity of removal of the party offending from the ship to some place of safety on shore. The authority is of a very delicate and summary nature, and is justified only by the same necessities which clothe private persons in other cases with extraordinary powers.

64. Thus, in case of a mutiny in port, with an intent to murder the officers or to embezzle the cargo;

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The two seamen were influential characters, and atrocious leaders of a rebellious crew. They had not misbehaved on the former part of the voyage, I considered it to be a partial breach of contract, and not a forfeiture *in toto*." Peters, J. (Peters' Ad. R. 173, note).

[1] 1 Peters' Ad. R. 176, note; see the Coriolanus, Crabbe's R. 239.

and the conspiracy is so extensive that the mutineers cannot be suffered to remain on board, but at the imminent hazard of the lives of the officers and the property on board, in such a case, by the eternal law of nature itself, the master has the right to remove them from the ship; and to imprison them, as well for punishment as safety, if he does not choose, as he may, to dismiss them altogether from his employment. If he does imprison, it must be with intent to take them on board again for the voyage, or to bring them home; and not with the intent merely to punish them, and at the same time to dissolve their connexion with the ship. The master can punish only to promote good discipline, and compel obedience to lawful orders on board of the ship. He is not clothed with judicial authority to sentence seamen to punishment for their offences.[1]

[1] U. S. v. Ruggles, 5 Mason, 192; Ship Moss, Gilpin's R. 219, 233; Wilson v. Brig Mary, Ib. 31. If from confinement and exposure in a jail, through the instrumentality of the master, the seaman should lose his life, without justifiable cause, the master is responsible, as in other cases of homicide. U. S. v. Ruggles, *supra*.

If the imprisonment of a seaman in a foreign port is improper, the expenses of it, or of the employment of a person in his stead, are not to be deducted from his wages. It is no justification of the improper imprisonment, or of any other illegal act, that the master acted by the advice of an American consul. Wilson v. The Brig Mary, *supra*; The Otis, Crabbe's R. 52; The William Harris, Ware's R. 367; Joy v. Almy, 1 Wood & M. 262. In this latter case, Judge Woodbury held, that, the master of a vessel is not justified in imprisoning a seaman merely on suspicion that he is a dangerous man, or on the request of the crew, unless some facts are shown rendering the truth of the charge probable, and if he detain him in custody till his effects on board are lost or sold, the master is answerable for their value. Damages for such im-

65. The arrest and imprisonment of a seaman in a foreign port, and sending him home by the public authority as a prisoner charged with an indictable offence, does not necessarily constitute a bar to a claim for wages for the voyage. Such proceedings do not preclude the Court from inquiring into the merits of the case, and making such a decree as the justice of the case requires.[1]

66. Ordinarily, the master has no right in inflicting punishment upon a mariner for misbehavior to employ deadly weapons. The use of them destroys the implication of moderation, which is the extent of the master's authority, and beyond which, if he goes, he becomes a trespasser, and is treated as such. We are now speaking of the ordinary exercise of

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prisonment will not be vindictive, unless perhaps when the master's motives appear to have been bad. But compensation for the time of the imprisonment, the value of his articles lost or sold, and interest on the amount and passage home, are the just measure of damages usually.

In the case of The Brig Mary, *supra*, Judge Hopkinson, without directly deciding the general question, whether the master of a vessel may, under any circumstances, imprison a seaman in the jail of a foreign port, under the control and discipline of a foreign police and its officers, for the mere maintenance of his own authority, observed, that the practice was one of doubtful legality. "It is," he said, "certainly to be justified only by a strong case of necessity. It is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be danger in keeping the offender on board, or some great crime committed, when this extreme measure is resorted to. It should be used as one of safety rather than discipline, and never applied as a punishment for past misconduct." See also The Coriolanus, Crabbe's R. 239.

[1] Smith v. Treat, Davies R. 266.

authority. But in subduing an insurrection or mutiny, any force requisite may be used, and any weapon which the occasion may require; because in such a case the master acts on the defensive, and is bound by his duty at all hazards to reduce the crew to order and discipline.[1] But if without any disobedience of orders or resistance, the master attacks any of the crew with a deadly weapon, he may be disarmed; and upon a principle common to the whole animal creation, man as well as brute, namely, the right of repelling unlawful violence threatened and impending.[2]

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[1] Sampson v. Smith, 15 Mass. R. 365; U. S. v. Peterson, 1 Wood. & M. 311; U. S. v. Wickham, 1 Wash. C. C. R. 316; Fuller v. Colby, 3 Wood. & M. 1, 14. In this latter case it was said, that such weapons might be used as are necessary to effect the object, when it is to obtain obedience, and not to punish for a past offence. Forbes v. Parsons, Crabbe's R. 283; Schelter v. York, Id. 449.

[2] U. S. v. Peterson, 1 Wood. & M. R. 311. In this case, Judge Woodbury observed, that the very same Acts of Congress which inflict heavy punishment on the crew for dangerous resistance to the master, inflict heavy penalties on him for unjustifiable blows, or unusual punishments, or insufficient or unwholesome food; and a seaman, when wronged abroad, can always rely with safety on ample redress at his return home, through the laws, and the juries and the judges of his country. It behooves him, then, with patience and order, as well as fidelity, to continue to discharge his own duties to the laws and flag of the Union, convinced, as he should be unfalteringly, that none will be allowed to violate them with impunity. It was also held in this case, that foreign seamen on board American ships are as much subject to punishment, for such disobedience or violence, as Americans, and are alike to be protected and redressed on their return home. To render a vessel American, so as to punish offences on board of her, it is enough to show, that she sailed from and to an American port, and was apparently owned and controlled by citizens of the United States.

67. A seaman may also, in extreme cases, resist the master, although the latter may not employ deadly weapons. "The mariner," says the Consolato del Mare,[1] "is bound to bear with the master if he reproves him in injurious language; and if he makes an assault upon him, he ought to fly to the prow, and put himself on the side of the chains; if the master pursues there, he ought to fly to the other side; and if the master pursues him there, he may call witnesses and stand upon his defence." The spirit of this article survives, and is a living principle of the existing maritime law.

68. "It is, however," said Judge Ware, in the case of Carlton v. Davis,[2] "only in very extreme cases that a seaman can be justified in turning upon the master and resisting him with force, and when he can protect himself from a dangerous assault in no other way. Nothing could be more pernicious to the police of the sea, than to admit that a seaman might, as a general rule, resist the master by force, even when inflicting undeserved punishment. It would be sure to lead to numerous scenes of violence and insubordination, and endanger all authority. The duty of a seaman, in such case, is to submit to wrong. The nature of the master's authority, which is of a *quasi* parental character, and the necessities of the service, imperiously require it. On his return to port, he may appeal to the law for redress,

[1] Ch. 165; see also Jugemens d'Oleron, Art. 12, Cleirac. p. 48; Laws of Wisbury, Art. 26, Ord. de la Marine, liv. 2, tit. 7, Valin, p. 553; Emerigon, Traité des Assurances, ch. 12, sect. 6.

[2] Davies' R. 221.

and the master will be held to strict responsibility for any abuse of his authority. If he does not do this, but takes jurisdiction of his own wrongs, and seeks redress from his own hands, the Courts will be slow in entertaining his complaint, and taking jurisdiction of an appeal from a wager of battle, even if originally he had just grounds of complaint. He may be in danger of impairing a good cause of action by matter *ex post facto*."

69. When the offence of the seaman is open and manifest, and of a nature to require punishment, and no delay is requisite for inquiry, it still is not necessary that the punishment should be inflicted at the very instant the offence is committed. It may be inflicted for past offences and the promotion of good discipline on board. Besides, if inflicted at the very moment of the offence, it will be in the heat of blood, and may be attended with a degree of rigor which would not have characterized the proceeding, perhaps, in a cooler moment.[1]

70. The sea laws enjoin on the master a temperate demeanor, and orderly and decent conduct, towards seamen. By several of these laws, he is finable for abusive expressions or misconduct towards mariners. But a peremptory or harsh tone, or an overcharged manner, in the exercise of authority, will never be held by a Court of Admiralty to justify resistance. It will not be sufficient that there has been a want of that personal attention and civility which usually

[1] Sampson v. Smith, *supra;* U. S. v. Ruggles, 5 Mason, 192; U. S. v. Peterson, *supra*.

takes place on other occasions, and might be wished generally to attend the exercise of authority. The nature of the service requires that those persons who engage in it should accommodate themselves to the circumstances attending it; and those circumstances are not unfrequently urgent, and create strong sensations, which naturally find their way in strong expressions and violent demeanor.[1] At the same time, the master risks the consequences, if he commences a dispute with illegal conduct and improper behavior.

71. It is impossible to fix with certainty, the nice tints and colors which mark the boundaries between a justifiable command and an improper exercise of authority. And this is seldom required, for the circumstances of each case are generally strongly marked. It should be understood by masters, that neither the law nor the administrators of it encourage or justify revenge. They punish only for the reformation of the offender, or for example, to deter

[1] Robinett v. The Ship Exeter, 2 Rob. Adm. R. 261; Benton v. Whitney, Crabbe's R. 417; Forbes v. Parsons, Crabbe's R. 283. In the case of Morris v. Cornell, 6 Law Rep. 304, the second mate being commanded by the master to desist from swearing, and retorting on the master that he had heard him swear, and stating the language, is no justification, it was held, for the master violently assaulting and inflicting a blow upon him. In such a case, there is no exigency, no emergency. The captain is bound to suppress his passion. If unable to control himself, he is unfit to command others. He is to set an example of calmness and self-possession; violence begets violence. Hasty words and rash acts on shipboard often produce deplorable consequences, which a little forbearance would have prevented.

others from offending.[1] While they excuse, and properly excuse, hasty words employed by him on occasions of emergency, which are usually attended with more or less excitement, they look with suspicion upon violent language employed at the very moment of inflicting punishment. It implies an undue violence of temper; and it is an admonition of the law, that passion is not to be indulged in the infliction of punishment, and that he who has to command others, is not fully prepared for the duties of that station, unless in some degree he commands himself.

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[1] Thorne v. White, 1 Peters' Adm. R. 175.

[2] The Agincourt, 1 Hagg. Ad. R. 290. In the case of Fuller v. Colby, 3 Wood. & M. 6, Judge Woodbury said :—"This Court will always be quite as anxious to redress any wrongs inflicted on the less intelligent seaman as on his more educated officer,—the law demanding a strict adherence to duty from both, *proper language no less than proper acts*, are the only means of protecting the rights of both, and rendering their situations respectable, and securing the interests and welfare of all concerned in the voyage." And he held, that a captain may strike a seaman for disrespectful words, upon a principle common alike to this relation and that of parent and child. See also 4 Wash. C. C. R. 340; Ware's R. 224; U. S. v. Smith, 3 Wash. C. C. R. 525; U. S. v. Freeman, 4 Mason, 511; Thorne v. White, 1 Peters' Adm. R. 171. Judge Woodbury was under the impression, that the language of Judge Story, in the case of Cushman v. Ryan, 1 Story's Rep. 100, was intended to deny that the master may strike a seaman for disrespectful words. There is nothing, however, in his opinion in that case, that will justify that construction. The syllabus of the reporter, however, states, that "no words of provocation will justify an assault, although they may constitute a ground for the reduction of damages." It is true, in common cases between individuals, that words never justify blows; but (it was said in the case of Fuller v. Colby), between officers and seamen, all blows are

72. Ordinarily, the right of inflicting punishment on shipboard is confined to the master. A distribution and extension of power, would be the parent of confusion rather than of order, and, by breaking in upon the unity of authority, would tend rather to the relaxing than the sustaining of good discipline.[1] The infliction of punishment by the subordinate officers of the ship, when the master is on board and at hand, can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal, or flagrant misbehavior on the part of the seamen, or to compel obedience to orders or other duties, which require prompt and instant action and interference on the part of the officers, and admit of no delay.

73. If the circumstances are not urgent and imperative, it is the duty of the mate and other officers to consult the master as to the infliction of punishment; for he, being in command of the ship, is alone

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proper for disobedience and insolence, which are justifiable by a parent to a child. I am unable to find anything in the case of Cushman v. Ryan, that runs counter to this doctrine, unless, indeed, it be, that Judge Story thinks there is more analogy between the relation of master and seaman, and master and apprentice, than between the relation of parent and child. Brown v. The Independence, Crabbe's R. 54. In this case it was held, that where a seaman, shipped for a voyage, is so severely chastised, with an improper weapon, because of his insolence, as to be necessarily left behind at a foreign port, he is entitled to his wages to the time of the vessel's arrival at the last port of delivery; but not to the benefit of the Act of 28th of Feb., 1803. See Forbes v. Parsons, Id. 283, as to what will entitle a seaman to recover damages for an assault and battery from the officers of a ship.

[1] Elwell v. Martin, Ware's Rep. 61.

ordinarily intrusted with the regulation of the ship's discipline; and no other person has any right to inflict punishment without his express or implied sanction thereof. Cases may, and do arise, where instant obedience to the orders of the mate is necessary; such as orders to take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden and emergent duty, when the mate may instantly enforce obedience by the application of positive force, and, indeed, of all the force required to produce prompt obedience. But, then, every such case is justified only from necessity, and the force so used is not so much a punishment as it is a means of compelling the performance of a pressing duty, admitting of no delay.[1] This is the only exception known to the general rule, that the master has the sole authority, when on board, to inflict, or cause to be inflicted, punishment on any of the crew. Hence, if he is present, when any punishment is inflicted by a subordinate officer, and can prevent it, and does not, he is personally responsible for the act, and, by his acquiescence, adopts it, as done by his authority.[2]

74. When the master is not on board, the next highest officer on board succeeds to his rights and authority *pro tempore*, so far as they are necessary for the due performance of the ship's duties.[3] While the inferior officers, as well as the common seamen, are

[1] U. S. v. Hunt, 2 Story's R. 125, 126; U. S. v. Taylor, 2 Sum. R. 588.

[2] Ibid.

[3] U. S. v. Taylor, 2 Sum. R. 588.

bound to obey the orders of the master, it must be understood that they are not bound to obey all his orders indiscriminately, whether lawful or unlawful. Hence if the mate, in obedience to the orders of the master, should inflict on a seaman, an unjust and cruel punishment, he will be held responsible as a joint trespasser with the master.[1]

75. It is the duty of the master to prevent, as far as he may, any undue exercise of authority by his subordinate officers, and any abuses, injuries, and trespasses by them. If he is present when any of the subordinate officers inflict chastisement upon the crew, he is bound in duty to interfere and restrain it, if it is improper in its nature or character, or unjustifiable under the circumstances. If he may interfere, and he does not, he must be deemed to assent and encourage it; for no officer in his presence has any right to inflict punishment without his assent or direction, unless upon an emergency, which admits of no delay. It is not sufficient for him to excuse himself from this interposition upon any notions of courtesy, or of upholding the authority of the officers, or of supporting the harmony and discipline of the ship. The law has intrusted him with summary powers for the good, not of the officers alone, but of the crew also, and indeed for the general good of the maritime service in which he is engaged. While he should uphold the just discipline of the ship with a steady confidence, he is to take care that the crew are not made the victims of

[1] Butler v. M'Clellan, Ware's R. 232.

the insolence, the passions, or the caprices of the officers under him.[1]

76. While the law upholds the authority of the master to inflict punishment for a proper cause, and with proper dispositions, it frowns upon all punishment inflicted for inadequate cause, or with improper motives. By an Act of Congress, it is provided, "That if any master or other officer of an American ship or vessel on the high seas, or on any waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.[2]

77. In the construction of this statute, it has been held, that the word "malice" means a wrongful act done intentionally, without just cause or excuse. The statute makes a distinction between the import of the words "malice, hatred, and revenge." Malice indicates the mildest form of wrongful intention; and hatred, or revenge, the more intense form, resulting from bad passions, and gross malignity and de-

[1] Thomas v. Lane, 2 Sum. R. 111.

[2] Act of 1835, ch. 40, sec. 3.

pravity of heart. If the offence were not punishable, unless there were bad passions in the case, then hatred or revenge would have been the only appropriate words. As the language stands in the statute, the word "malice" has a substantial meaning and covers all cases of intentional wrong not included in the other words.[1] To incur the penalties of this act, there must exist not only malice, or hatred, or revenge, but there must be a want of justifiable cause for the beating. If the party inflict the injury, however maliciously; still, if he has a justifiable cause, the statute offence is not committed. Malice, hatred, or revenge, must concur with a want of justifiable cause to inflict the injury, to constitute the statute offence.[2]

78. If the mode of punishment, or coercion, was unjustifiable, or, in other words, if there was no justifiable cause for the punishment, then the jury must determine whether it was done by the party from "malice, hatred, or revenge." And in passing upon this question, they must look at all the facts of the case.[3] The word "crew" employed in the Act, was intended to include the officers, as well as the common seamen. It is used as equivalent to ship's company.[4] While the master may restrain the commission of great crimes on the part of the crew, and is bound to do so, he has no judicial authority to punish the criminal. His authority and duty are limited to

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[1] U. S. v. Taylor, 2 Sum. R. 537.

[2] Ibid.

[3] U. S. v. Alden, 7 Law Rep. 469.

[4] U. S. v. Winn, 3 Sum. R. 209.

securing his person and bringing him before a proper tribunal of his country for punishment.[1]

79. The duty of the seamen, after they have once entered fully on their service under their contract, is obedience, and that obedience is due, and may be enforced, as well in a river, at anchor, and before a clearance is obtained, as upon the high seas, and after a regular clearance. If the rule of law were otherwise, all order would be frustrated, and the due navigation and safety of the vessel rendered impossible.[2]

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[1] Abbott on Shipp., 239, and notes.

[2] U. S. v. Staly, 1 Wood. & M. 338; U. S. v. Hamilton, 1 Mason, 443; U. S. v. Stevens, 4 Wash. C. C. R. 547. In the case of U. S. v. Staly, *supra*, which was an indictment for a revolt, it appeared in evidence that the defendant, and several others, shipped on a voyage to Apalachicola, or elsewhere, for a market, and were taken on board the barque the evening previous to the transaction complained of. The vessel lay at anchor in the stream, and in the morning on unfurling the sails, the mainsail was asserted by the men to be in such a dilapidated condition, and some of the rigging so much out of order, that they objected to going to sea in the vessel, as not seaworthy, and made offers to rescind their contract, and pay back the advance which they had received in money. The officers denied that she was unseaworthy, and undertook to enforce duties under the contract, which led to the collision and resistance complained of. Judge Woodbury charged the jury, that whether the vessel was seaworthy or not, was a fact to be settled by them. If she was not seaworthy, and the seamen, on going on board and examining her, objected to serving on that account, it must be considered a refusal to enter upon the discharge of their contract, and not a violation of duty after their service has commenced under it. In such a case, the remedy against them, if any, is a civil one, for not beginning to serve under the articles, and not a criminal one, for breaches of duty, after having entered

80. When a seaman complains against the master for an assault, and it is proved that he has been guilty of misconduct which would justify some punishment, he cannot entitle himself to a decree but by showing that the punishment was excessive in degree, or unjustifiable in kind. The master has a right to correct the disobedience of a seaman by corporal punishment in cases where the necessities of the service call for it, and though it should be sparingly resorted to, a Court will not hold the master amenable if he does not pass the limit of a reasonable and moderate discretion. However the truth of the fact may have been, the *onus* is upon the libellant to prove that such limit has been passed.[1]

81. When a seaman brings a suit for damages against the master for illegal and unjustifiable punishment, he puts in issue his general conduct and cha-

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upon duty. If subsequent to the shipment and commencement of service, the vessel is believed not to be seaworthy, the seamen cannot refuse obedience, but may ask a survey if in port, and if not, but within sight of land, request the master to return and have the survey. Should he then conduct unreasonably, or in any way treat them with unnecessary severity, their remedy is at law after their return, and not a resort to violence, unless in danger of the actual loss of life, and then at their peril as the result may turn out.

Judge Woodbury also held, that if the vessel had not cleared, but was lying at anchor in a navigable stream, where the tide ebbs and flows, the seamen on board are bound to obedience; and that the Court probably had jurisdiction over a revolt there, and would exercise it, if no evidence was offered as to the limits of the jurisdiction of a State; and in the absence of such evidence, the objection to the jurisdiction would be considered as waived.

[1] Carleton v. Davis, Davies R. 221. Ware, J.

racter during the voyage, or rather enables the master to put it in issue. But when the master means to rely on such matter in justification, or in mitigation of damages, he must set it out in his answer in a distinct allegation. The libellant has then notice of the defence, and may be prepared to meet it. But if the answer contains no such defensive allegation, the libellant has no reason to suppose that his general conduct for the voyage is intended to be called in question.[1]

[1] Pettingill v. Dinsmore, Ibid. 208; Benton v. Whitney, Crabbe's R. 417.

## CHAPTER IV.

### OF OFFENCES COMMITTED AT SEA.

82. Having treated, in the preceding chapter, of the master's authority over the seamen, as that authority has been recognised or defined by judicial tribunals, we now proceed to consider those particular acts, the commission of which involves crime and consequent punishment. We shall not enter far into the province of criminal law, and specify all the offences which may or are likely to be committed at sea. Our purpose will be accomplished by an examination of those particular offences which are of so dangerous and aggravated a nature, that they have challenged the attention of Congress, and been made the subject of legislative enactments. We shall, however, make an exception in the case of barratry, an offence belonging perhaps more properly to the law of marine insurance, but nevertheless of such frequent occurrence, that it deserves to be mentioned here with some particularity.

83. Barratry is an act committed by the master or mariners of a ship for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury. It follows, therefore, from the very terms of the definition, that it cannot be committed by a master who is owner

for the voyage; because he cannot commit a fraud against himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship.[1]

84. A part-owner, it seems, being master, may

[1] Marcardier v. Chesapeake Ins. Co., 8 Cranch's R. 39; Abbott on Shipping, p. 242. "The term *barratry*," says Lord Tenterden, "which is often used as well by foreign writers as those of our own nation, is generally understood in this as in most other countries to denote a fraudulent act of the master or mariners committed to the prejudice of the owners of the ship. In France it is often used in a more enlarged sense, and comprehends acts of mere ignorance or unskilfulness not accompanied with a fraudulent design. To our definition of barratry, it is not essential that the act should be done by the master for his own benefit, or with the intent of injuring his owners. Thus, if he sail out of port without paying port duties, whereby the goods are forfeited, lost, or spoiled, or if he cruise in quest of prizes without proper authority, and contrary to the orders of his owners, or if he disregard an iceberg, or attempt a breach of a blockade, or be concerned in smuggling, or connive at smuggling by his mariners, he is guilty of barratry. And when a master had general instructions to make the best purchases with despatch, it was considered that such instructions must mean legal purchases, and legal despatch, and that going into an enemy's settlement to trade, although his cargo would be more speedily and cheaply completed there (the ship being seized and confiscated on account of it), was barratry. Nor was it thought to make any difference that he intended thereby to promote his owner's interest. It is not for him to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavors to advance the interests of his owners by means which the law forbids, and which his owners must be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been their own sense of public duty, but also from a consideration of the risk or loss likely to follow from the use of such means."

commit barratry against another, and the owners or master may commit the offence against the general freighter, or with consent of the freighters against the owners.[1] It has been said, that the fraudulent act must tend to the benefit of the offending parties,[2] but this is not necessary to constitute the offence.[3] True, if the act is for the interest of the master, or the mariners, it will evince a strong presumption of fraud, but if it is for an unlawful purpose, the offence is committed, no matter whether the party derives benefit or not.[4]

85. If the question turn merely on the fraud, it will always be necessary to look at the motives and intention which influenced the act. If the motive

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[1] Ibid.

[2] Kendrick v. Delafield, 2 Caines' R. 71.

[3] Dederer v. The Del. Ins. Co., 2 Wash. C. C. R. 61, 66; Abbott on Shipping, p. 243. An error of judgment on the part of the captain in a matter where he is intrusted with discretion, does not of course fall within the meaning of barratry. In the case of Todd v. Ritchie, 1 Stark. R. 190, which was assumpsit on a policy of insurance, one count of the declaration alleged the loss to have arisen from the barratry of the master. It appeared, that after the vessel had left Quebec with her homeward cargo on board, she sprung aleak, and the captain put into Gaspé, in the Gulf of St. Lawrence, and before any survey had taken place, he broke up her ceiling and end bows with crowbars, in consequence of which the ship was much injured and weakened. This was done, it was suggested, in order to procure the condemnation of the vessel. Upon these facts Lord Ellenborough observed to the plaintiff's counsel: "In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands, there is a whole ocean between you and barratry."

[4] Ibid.

were to benefit the owner, it is an honest one, though it may be a mistaken one, and therefore the act cannot be called barratrous. The case of a wilful deviation for the benefit of the owner, is an example which attests the truth of the principle; but if made for the benefit of the master, it would be an act of barratry. If the act be fraudulent or criminal, it is barratry. In that, all the cases concur. But it by no means follows that every illegal act is a criminal one. On the contrary, cases may occur where the act of the master is in violation of law, but involves neither fraud nor crime. Suppose, for example, the captain ignorantly commit a breach of blockade, or violate some foreign ordinance with which he is unacquainted: these acts would be illegal, but not criminal. The illegality of the act, though no improper or fraudulent motive appear, may be *prima facie* evidence of fraud or of crime; but this presumption may be repelled by evidence.[1]

86. Sailing out of port, without paying port duties, whereby the ship is forfeited, constitutes barratry.[2] So breach of an embargo, or blockade, or resistance of search, or smuggling, or cruising under a letter of marque, against the owner's instructions or intentions, or illegal rescue of a neutral ship, by the master after capture.[3] From these examples it will be

[1] Dederer v. Del. Ins. Co. 2 Wash. C. C. R. 61; Wiggin v. Amory, 14 Mass. R. 1; Phyn v. Royal Ins. Co., 7 T. R. 505; Hood v. Nesbit, 2 Dall. R. 137; Thurston v. Columbian Ins. Co., 3 Caines, R. 89. But see ante, 108, note 1.

[2] Knight v. Cambridge, 1 Strange, 581; Vallejo v. Cowper, Cow. R. 153.

[3] Story's Notes, Abbott, p. 243.

seen, as we have before observed, that it is not essential that the act should be done by the master for his own benefit, or with intent of injuring his owners. But in all the instances here cited, the act is fraudulent, and is committed to the prejudice of the owners of the ship. And that constitutes the offence.

87. It has wisely been provided by Congress, for the benefit of underwriters and other parties in interest, that "any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death."[1] By another section it is provided, that "if any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any vessel of which he is owner, in part, or in whole, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite any policy or policies of insurance thereon, or if (of) any merchant or merchants that shall load goods thereon, or of any other owner or owners of such vessel, the person or persons offending therein being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death."[2]

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[1] Act of 26th March, 1804, sect. 2.

[2] Ibid. sect. 3. The word "if" in this section is inserted by mistake for "of." By the 7th section of the Act of July 29, 1850,

88. To destroy a vessel within the meaning of the foregoing provisions of the statute, is to unfit her for service, beyond the hope of recovery by ordinary means. This, as to the extent of injury, is synonymous with cast away. It is the generic term: casting away is a species of destroying, as burning is. Both mean such an act as causes a vessel to perish or be lost, so as to be irrecoverable by ordinary means.[1] It will be perceived that the law punishes the act when done with an intent to prejudice; it does not require that there should be an actual prejudice. The prejudice intended is to be to a person who has underwritten, or shall underwrite, a policy thereon. It does not prescribe that the policy should be valid, so that a recovery could be had thereon. It points to the intended prejudice of an underwriter *de facto*.[2]

89. The terms "any person or persons" in the Act, extend to corporations and bodies politic, as well as to natural persons. The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. Corporations

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it is provided that any person, not being an owner, who shall, on the high seas, wilfully, with intent to burn or destroy, set fire to any ship or other vessel, or otherwise attempt the destruction of such ship or other vessel, being the property of any citizen or citizens of the United States, or procure the same to be done, with the intent aforesaid, and being thereof lawfully convicted, shall suffer imprisonment to hard labor for a term not exceeding ten years, nor less than three years, according to the aggravation of the offence.

[1] U. S. v. Johns, 1 Wash. C. C. R. 363; S. C. 4 Dall. 412.

[2] U. S. v. Amedy, 11 Wheat. 392.

for civil purposes, and within the purview of penal statutes, are deemed persons.[1] On an indictment then under this act, it is sufficient to show the existence of an association actually carrying on the business of insurance, by whose known officers *de facto* the policy was executed, and to prejudice whom the vessel insured was destroyed. It is not necessary to prove the existence of a legal corporation authorized to insure, or a compliance on the part of such corporation with the terms of its charter, or the validity of the policy of insurance.[2]

90. To prevent combinations with persons on land, it is provided, by another act, that "if any person or persons shall, on the high seas, or within the United States, wilfully and corruptly conspire, combine, and confederate with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy any ship or vessel, or to procure the same to be done, with intent to injure any person, or body politic, that hath underwritten, or shall thereafterwards underwrite, any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person, or body politic, that hath lent or advanced, or thereafter shall lend or advance any money on such vessel, in bottomry or respondentia, or shall, within the United States, build or fit out, or aid in building or fitting out any ship or vessel, with intent that the same shall be cast away, burned, or destroyed, for the purpose or with the design

[1] U. S. v. Amedy, 11 Wheat. 392; 2 Inst. 736.

[2] U. S. v. Amedy, *supra*.

aforesaid, every person so offending shall, on conviction thereof, be deemed guilty of felony, and shall be punished by fine not exceeding ten thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years.[1]

91. It is also provided by an early Act,[2] that if any person commit, upon the high seas, or in any river, haven, basin, or bay, *out of the jurisdiction of any particular State*, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any vessel, shall piratically and feloniously run away with such vessel, or any goods or merchandise to the value of fifty dollars, or yield up such vessel voluntarily to a pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death. It will be seen in a subsequent section, that the penalty for making a revolt is now changed.[3]

92. The section which we have quoted above is the 8th of the Act, and in the construction of it, it has been held by the Supreme Court of the United States, that general piracy, or murder, or robbery,

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[1] Act of March 3, 1825, sect. 23.

[2] Act of 30th April, 1790, sect. 8.

[3] Vide sect. 96, post.

committed in the places described in the section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this Act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations; and the Court thought that the general words of the Act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but the Court were of opinion that they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.[1] It should be observed, that the words "out of the jurisdiction of any particular State," are construed to mean out of the jurisdiction of any particular State of the Union. Particular State, is uniformly used in this Act in contradistinction to United States.[2]

[1] U. S. v. Klintock, 5 Wheat. R. 144, 152; U. S. v. Palmer, 3 Wheat. 610.

[2] U. S. v. Furlong, 5 Wheat. 184. In the case of U. S. v. Holmes, 5 Wheat. 412, 417, Mr. Justice Washington, in delivering the judgment of the Court, said: "In respect to the first question before the Court, the Court is of opinion, and so it has been decided during the present term, that it makes no difference

93. Upon the question, whether the Act, which we are now considering, makes robbery piracy, and therefore punishable with death, we have the judgment of the Supreme Court of the United States.[1] In the case of the United States v. Palmer, it was contended by the counsel for the defendant, that Congress did not intend to make that a capital offence on the high seas, which is not a capital offence on land. That only such murder, and such robbery, and such other offence as, if committed within the body of a county, would, by the laws of the United States, be punishable with death, is made piracy, &c. Chief Justice Marshall, who delivered the opinion of the Court, said that this argument was entitled to great respect, but the Court could not assent to its correctness. "The Legislature," he observed, "having specified murder and robbery particularly, are understood to indicate clearly the intention that these offences shall amount to piracy; there could be no other motive for specifying them."

94. Piracy by the law of nations is robbery, or forcible depredations upon the sea, *animo furandi*.[2] To constitute the offence, within the meaning of the

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whether the offender be a citizen of the United States or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails. If it be committed either by a citizen or a foreigner, on board of a piratical vessel, the offence is equally cognizable by the Courts of the United States, under this law."

[1] U. S. v. Palmer, 3 Wheat. R. 610, 627.

[2] U. S. v. Smith, 5 Wheat. R. 153, 161.

statute, the vessel must be run away with by a captain or mariner of the vessel, and it must be done piratically and feloniously. The statute does not require that there should be any personal violence or putting in fear. The terms "piratically and feloniously" do not necessarily imply personal force or violence. The "piratically and feloniously running away with a ship" within the statute, is the running away with the ship, with the wrongful and fraudulent intent thereby to convert the same to the taker's own use, and to make the same his own property against the will of the owner. The intent must be that wicked and depraved intent, that *animus furandi* which the law deems felonious. It must be a fraudulent and unlawful conversion of the property for the sake of gain, with the intent to despoil the owner thereof against his will.[1]

95. It will be observed, that one of the offences specified by the 8th section is, the laying violent hands upon the master to hinder and prevent his fighting in defence of the ship or cargo. Any force employed of any character against the master for the purpose described, would seem to fall within the intent and meaning of the Act. If any one or more of the seamen point a pistol or bayonet at the breast of the master, "thereby to hinder or prevent his fighting in defence of the ship or goods committed to his trust," they employ a more effectual mode to accomplish their object, than if they had in the language of the statute, "laid violent hands upon him." The Legislature, it seems to us, intended to strike at the

[1] U. S. v. Tully, 1 Gallis. R. 247.

particular offence, and not at the mode by which it might be committed. "The true rule," says Sir William Jones, "is, that criminal laws should be construed liberally as to the offence, and strictly as to the offender."[1]

96. The offence of making a revolt in the ship, which, under the 8th section of the Act,[2] is punishable as a capital offence, is now, by the Act of 3d March, 1835,[3] punishable by a fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence. Revolts on shipboard are now to be considered as defined by this latter Act, and consist not only in attempts to usurp the command from the master, or to transfer it to another, or to deprive him of it for any purpose by violence, but in resisting him in the free and lawful exercise of his authority.[4] If the

[1] Life of Sir W. Jones, p. 268.

[2] Act of 30th April, 1790.

[3] Act of 3d March, 1835, ch. 313, sect. 1.

[4] U. S. v. Peterson, 1 W. & M. 305. In the case of U. S. v. Almida, Wharton's Criminal Law, 2d Ed. 818, Judge Kane said that, "the unlawful acts which now fall within the definition of a maritime revolt, are distributed by the language of this section (sect. 1, Act 1835), into four categories or classes. 1. Simple resistance to the exercise of the captain's authority. 2. The deposition of the captain from his command. 3. The transfer of the captain's power to a third person. 4. The usurpation of the captain's power by the party accused. It is impossible to analyze the section as I have done, without remarking that the offences which it includes, however similar in character, differ widely in degree. The high act of unpremeditated resistance to the captain cannot be identified with his formal degradation from his command, still less with the usurpation of his station, without overlooking the

vessel has not cleared, but is lying at anchor in a navigable stream, where the tide ebbs and flows, the seamen on board are bound to obedience, and the Courts of the United States presumptively have jurisdiction over a revolt there, and will exercise it, if no evidence be offered as to the limits of the jurisdiction of the State, and any exception on this account is apparently waived.[1]

97. If any seaman or other person commits manslaughter upon the high seas; or confederates, or attempts, or endeavors, to compel any commander, master, officer, or mariner, to yield up, or run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to, or confederate with, pirates, or in anywise trade with any pirate, knowing him to be such, or furnish such pirate with any ammunition, stores, or provisions of any kind, or fits out any vessel knowingly,

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gradations of crime, and confounding the accidental turbulence of a heated sailor with the deliberate and daring and triumphant conspiracy of mutineers." In this case judgment was arrested, upon the ground that the indictment charged all the prisoners, simply and alike, with "making a revolt." "The party accused," said Judge Kane, "is entitled to the most clear specification of his offence, that its character and circumstances reasonably admit of; and it cannot be said that he has had this, when a more direct description is furnished in the very words of the Act under which he is indicted."

See also U. S. v. Forbes, Crabbe's R. 558. A mere disobedience by one or two of the seamen, without combining with the others, or offensive or insolent language, is not a revolt. There must be either an actual or constructive suspension of the master's command, to establish a revolt.

[1] U. S. v. Staly, 1 W. & M. 338.

and with a design to trade with or supply, or correspond with, any pirate or robber, upon the seas; or if any person or persons in any way consult, combine, confederate, or correspond with any pirate or robber upon the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman confines the master of any ship or other vessel, or endeavors to make a revolt in such ship; such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.[1] The offences of confining the master and endeavoring to commit a revolt, are now punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding five years, or both, according to the nature and aggravation of the offence.[2]

98. A confinement of the master, within the meaning of the statute, is not limited to mere personal restraint by seizing him and preventing the free movements of his body, nor to imprisonment in any specific place, as locking him in a state-room or cabin; it is equally a confinement, within the statute, to prevent him from free movements about the ship by force, or intimidation, as by limiting him to walking on a particular part of the deck by terror of bodily injury, or by present force; if he is surrounded, and prevented from moving where he pleases, according to his rights or duty as master, under threats of force, or if he is restrained from going to any part of the ship by an avowed determi-

[1] Act 1790, ch. 36, sec. 12.

[2] Act of March 3, 1835, sec. 1.

nation of the crew, or of any part of them, to resist him, and to employ force adequate to prevent it, these fall within the meaning of confinement.[1]

99. If the person of the master is in fact seized, or if he is in fact held in personal restraint, whether for a long or short time is immaterial, it is a confinement within the meaning of the statute; and it subjects the party to punishment, unless he can establish that it was done in justifiable self-defence, or for some other legal cause.[2] If the master assault a seaman without cause, he may restrain the master with so much force, and so long as is necessary for this purpose. And if he is suddenly seized by the master, and without any intention of restraining him of his liberty, from the mere impulse of nature he takes hold of the master, to prevent any injury, for an instant only, and as soon as may be he withdraws the restraint, so that the act may be fairly deemed involuntary, it might not, perhaps, be deemed an offence within the Act, even though the seizing by the master was strictly justifiable; for the will must co-operate with the deed. But if the seizing by the master be justifiable, and he does not exceed the chastisement which he is by law entitled to inflict, then the seaman cannot restrain him, but is bound to submit; and if he does hold the master in

[1] U. S. v. Hemmer, 4 Mason, 106; U. S. v. Smith, 3 Wash. C. C. R. 78.

[2] U. S. v. Savage, 5 Mason, 460. A mere assault and battery committed at sea by a seaman upon his commander, does not amount to a confinement of the commander, nor to an attempt to excite a revolt, within the Act of Congress of April 30, 1790, c. 9, s. 12; U. S. v. Lawrence, 1 Cranch's C. C. R. 94.

personal confinement or restraint, it is an offence within the statute.[1]

100. When the seamen combine and compel the master to return into port, upon the ground of the unseaworthiness of the vessel, it does not amount to an endeavor to commit a revolt, if they act *bona fide* and the vessel is actually unseaworthy, or if they act *bona fide* and upon reasonable grounds, and apparent unseaworthiness. Judge Story, in the case of U. S. v. Ashton,[2] added this qualification to the doctrine, namely, that in addition to honest motives, reasonable grounds, and apparent unseaworthiness, it must appear at the trial to be doubtful whether the vessel be unseaworthy or not. For if it should appear that the vessel actually was seaworthy, then the offence is committed, no matter how honest the motive or how apparently unseaworthy she might have been, when the seamen compelled the master to put into port.

101. "If the ship," he says, "was at the time clearly seaworthy and fit for the voyage, whether the seamen acted by fraud or mistake, or upon a fair but false judgment of the facts, it seems to me the offence was committed." Again he says: "Suppose the ship to be in that state in which the presumption of apparent unseaworthiness really arises, and the crew *bona fide* act upon that presumption, and the Jury should be of opinion that they acted justifiably upon that presumption at the time; and sup-

[1] U. S. v. Thompson, 1 Sum. 168, 172.

[2] 2 Sum. 13.

pose upon the trial it should turn out that there is real doubt whether the ship be seaworthy or not; or upon the evidence the case is nearly balanced in the conflict of credible as well as competent testimony, and the Jury should on the whole deem the preponderance of evidence just enough to turn the scale in favor of seaworthiness; but not to place it entirely beyond doubt—I ask, whether, under such circumstances, the crew ought to be convicted of the offence charged, having acted upon their best judgment fairly, and in a case where respectable, intelligent, and impartial witnesses should assert, that they should have done the same; and when even the Jury themselves might adopt the same opinion, although there might be an error in the fact of seaworthiness, as established at the trial—I have great difficulty in coming to the conclusion, that under such circumstances the crew were guilty of the offence charged."[1]

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[1] Lord Abinger, in summing up to the Jury, in Regina v. M'Gregor, 1 Car. & K. 428, said, "By revolt, I understand something like rebellion or resistance to lawful authority. Persons who rebel against and resist the constituted authorities, if they are subjects, are said to be in a state of revolt; and if the crew of a ship combine together to resist the captain, especially if the object be to deprive him of his authority altogether, it will, in my opinion, amount to making a revolt. Revolt means something more than the disobedience of one man. You will say whether the conduct of the crew, or some part of it, amounted, at any time, to a revolt, or, if not, whether these men by their conduct endeavored to stir up a revolt. I think it would be straining the evidence rather too far to say, that the conduct of these men amounted to a revolt; and the charge of making a revolt, if my construction of the Act is correct, will fall to the ground, and the question will be upon the evidence, whether, by their conduct, they endeavored to

102. The offence of endeavoring to commit a revolt is a substantive offence, and consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel, by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.[1] Whenever by the overt acts of the crew, the authority of the master in the free navigation or management of the ship, or in the free exercise of his rights and duties on board, is entirely overthrown, and there is, intentionally caused by such acts, a suspension, actual or constructive, of his power of command, it is a revolt of the crew. Direct, positive force upon the master is not essential; positive constraint or imprisonment of the master is not essential. A total refusal to perform any duty on board, until he has yielded to some illegal demand of the crew, when it has produced *de facto* a compliance, or a suspension of his power of command, is a revolt. And any act, or attempt, or combination to produce such a revolt, is an endeavor to make a revolt. These cases are not put as the only ones in which a revolt may exist.

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excite a revolt. The question of whether the ship was properly fitted up and found is not material, for it has been decided in a case in this Court, that, although there be real grievances to redress, yet it is not an answer to a charge of attempting to make a revolt." See Rex v. Hastings, 1 M. C. C. R. 82. His Lordship was also of opinion upon the construction of the Act of Parliament (11 & 12 Will. 3, c. 7, s. 9), that the resistance of one person to the authority of the captain would not be a revolt.

[1] 11 Wheat. R. 417, U. S. v. Kelly.

They are put merely as examples and illustrations of the doctrine.[1]

103. A mere act of disobedience to a lawful command of the officers, is not of itself an endeavor to create a revolt; but, to amount to the offence, it must be combined with an attempt to excite others of the crew to a general resistance or disobedience of orders, or a general neglect and refusal of duty.[2] Perhaps, if the crew were to combine together to resist a single lawful order of the master, or to com-

[1] U. S. v. Haines, 5 Mason, 276, 277. This case has been thought to conflict with the doctrine laid down by the Supreme Court of the United States, in the case of U. S. v. Kelly, 11 Wheat. 417. But such was not the opinion of Judge Story. "It is supposed," he says, "that the case of U. S. v. Kelly, inculcates a different doctrine. If it does we are certainly bound by it. But I feel the utmost moral certainty that such was not the understanding of the Court itself; and though there is some slight foundation in the language used in that opinion for the present argument, a close examination of it will not justify the conclusion, that it is at variance with what we have now asserted as our own opinion. That case was brought before the Court for the mere purpose of ascertaining, whether, as the Act of Congress does not define the offence of endeavoring to make a revolt, it was competent for a Court of law to give a judicial definition of the offence. There had been a doubt expressed elsewhere, whether it was not indispensable that Congress should have defined what a revolt was, before the Court could proceed to punish it; and that doubt had been followed up by a decision, that such a definition by Congress was indispensable, and that decision had led to an acquittal of the person charged with the offence. The point was brought to the Supreme Court for a final decision. . . . . The Court look to the fact, whether there is an overthrow of the master's authority, or a removal of him from his command, intended; and not to the mode by which it is accomplished."

[2] U. S. v. Smith, 1 Mason, 147, 148.

pel him by force to yield up his authority in a single case, and were to proceed in the execution of their purpose, all their acts, done towards its accomplishment, might be properly deemed endeavors to make a revolt. The endeavor to make a revolt necessarily implies an attempt to stir up others of the crew to a resistance or rebellion against the lawful authority of the master and officers; and the offence is not committed, if the party does not attempt or endeavor to combine or excite others of the crew to aid in his unlawful purposes.[1] If the crew have combined together to disobey orders, and to do no duty, the offence is complete by such combination, although no orders have been subsequently given. But a simple refusal, by one or more, to do duty, does not amount to the offence, unless it is done by a common combination, or to effect a common purpose. In short, the parties must act together, and with the intention of mutual encouragement and support.[2]

104. It is by no means necessary that there should be any previous deliberate combination for mutual aid and encouragement, or any preconcerted plan of operations to effect the illegal object. On the contrary, however sudden may be the occurrence, or unexpected the occasion, of such disobedience or resistance, those who take a part in it, whether by words or by deeds, by direct acts of aid or assistance, or by encouragement or incitement, are in contemplation of law guilty of the offence. Their conduct,

[1] U. S. v. Smith, 1 Mason, 147, 148.

[2] U. S. v. Barker, 5 Mason, 404, 407; U. S. v. Forbes, Crabbe's R. 558.

under such circumstances, amounts to an endeavor to commit a revolt by overthrowing, *pro hac vice*, the lawful authority of the commanding officer of the ship.[1]

105. The crew are bound to service on board after the original master ceases to be such. They are bound to serve under the mate, acting as master, under a regular substituted appointment. The contract of seamen for the voyage is not suspended or extinguished by the original master's ceasing to be such, by death, by removal, by resignation, or otherwise. They are bound to perform the voyage under any person who is lawfully substituted master for the voyage; for their engagement is, in substance, an engagement with the owners for the voyage, and not with a particular master, so long as he remains such. But if the substituted master is grossly incompetent to the duties of his station, from want of due skill or from grossly bad habits, or from profli-

[1] U. S. v. Morrison, 1 Sum. 448. By the 2d section of the Act of 3d March, 1835, it is provided, that if any one or more of the crew of any American ship or vessel on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire, or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite, or stir up any other or others of the crew to disobey or resist the lawful orders of the master or other officer of such ship or vessel, or to neglect or refuse their proper duty on board thereof, or shall unlawfully confine the master or other commanding officer thereof, every such person so offending shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

gate and cruel behavior, that may furnish a suitable excuse for a refusal to do duty, or to remain by the ship. But such a case must be clearly made out, beyond all reasonable doubt; and it is not to be presumed or inferred. Any acts, therefore, which, if committed under the original master, would amount to a revolt, or an endeavor to commit a revolt, will amount to the same offence, if committed under a regularly substituted master.[1] When there is a deviation from the voyage described in the shipping articles, the seamen are discharged from any obligation of proceeding farther on the voyage. And their refusal to do duty, after such deviation, does not in law amount to an endeavor to commit a revolt, under the Act of Congress.[2]

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[1] U. S. v. Cassedy, 2 Sum. R. 582.

[2] U. S. v. Matthews, 2 Sum. R. 470; Act of 3d March, 1835, ch. 40, sec. 2.

# CHAPTER V.

## OF THE DISCHARGE OF SEAMEN.

I. Of the Causes that Justify the Master in Discharging a Seaman.
II. Of the Mate, and the Master's Authority to Discharge or Disrate.
III. Of the Laws for the Relief of Seamen.

106. We considered, in a previous chapter, the provisions of our laws with respect to the hiring of seamen, and the means for their comfort during the progress of the voyage. We are now to consider the Acts which more immediately concern the protection of sick and disabled mariners. It will be proper, however, in the first place, to notice those Acts which relate to the maintenance and return of American seamen who are destitute, and in a foreign port.

107. The Act of 1803[1] provides, that "whenever a ship or vessel, belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall with his own consent be discharged in a foreign country, it shall be the duty of the master or commander to produce

[1] Act U. S. 28th Feb., 1803, ch. 62, sec. 3.

to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid, and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman, two-thirds thereof to be paid by such consul or commercial agent to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in such foreign port; and the several sums retained for such fund, shall be accounted for with the Treasury, every six months, by the persons receiving the same."

108. This statute applies only to the case of a voluntary sale of the vessel, and to a strictly voluntary discharge of a mariner, and not to a sale or discharge, rendered unavoidable by an imperious and overruling necessity. A sale is, within the mercantile and reasonable sense of the word, necessary when the vessel cannot be repaired but at a great sacrifice of the interests of the owners. And when a voyage is broken up for such cause, the seamen are not properly discharged, but the whole enterprise is brought to a premature conclusion by a for-

tuitous event, for which neither party is responsible.[1]

109. But if the damage is not of so grave a character but that the vessel may well be repaired within a reasonable time, and at a reasonable expense, the case will not be withdrawn from the statute because the owner or master happens to meet with an opportunity of disposing of her on advantageous terms, and making a better speculation by the sale than by repairing and continuing the voyage.[2] In the case of capture, where the seamen

[1] The Dawn, Ware's R. 485; S. C. Davies' R. 121.

[2] The Juniata, Gilpin's R. 193; The Dawn, *supra*. In the case of The Juniata, Judge Hopkinson observed, that "if the necessity of a discharge can ever afford a legal reason for the seamen not being paid, it must at all events be necessity of the most urgent kind; not such as will enable a merchant, desirous of changing his voyage, to get rid of his seamen without expense. He must have no option. His vessel must be a wreck. If he can repair her, he must do so; or if he does not choose, he must provide for his seamen, who are thrown ashore destitute, by a contrary determination. If he is bound, as he undoubtedly is, when his vessel is damaged, to send on the cargo to its place of destination, so is he bound to provide, in the manner the law has pointed out, for the future welfare of his crew, with whom his contract has been suddenly broken. But does the law admit even the absolute necessity of abandoning the voyage, to be a ground for discharging the seamen without any future provision? A previous section seems to designate the only circumstances under which a captain is allowed to leave a seaman, without such provision, in a foreign country, and they are when he dies, absconds, or is forcibly impressed into other service. It does not include the abandonment of the voyage, even when caused by necessity, because it was intended that a provision for such an event should always be made. The owner is to calculate for it exactly as for the other

remain by the vessel and await the result of the prize proceedings, if she is released and able to proceed on the voyage, but the crew are discharged, they are entitled to the three months' pay provided by the statute.[1] The Act applies as well to a voluntary

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expenses of his voyage; it is as much a part of them as are the wages stated in the shipping articles. It is not to be regarded as a penalty for a default, but a contribution incident to navigation."

In the case of Luscomb v. Osgood, 7 Law Rep. 132, a minor, without the knowledge of his father, concealed himself on board a whaling vessel before she sailed from Salem, and was not discovered by the master until she had dismissed her pilot. When about a month out, the master stopped at Fayal, where there was an American consul, but said nothing to him about the boy. The boy performed the duty of a seaman during the whole voyage, and when eighteen months out, signed the shipping articles. It was held, that the father of the boy was entitled to wages from the time the ship sailed from Fayal. The master might have left him with the consul without paying three months' wages, as in case of a seaman *discharged* in a foreign port, and as required by the Act of 1803, *supra*. In such a case, it would have been the duty of the consul to provide for and send him to the United States.

[1] The Saratoga, 2 Gallis. R. 164. "The question of eventual loss upon repairing and proceeding on the voyage, is, I apprehend," said Judge Ware, in the case of The Dawn, Ware's R., *supra*, "to be viewed in relation to the party who is ultimately to bear it. If the owner is highly insured, he may think it for his interest to abandon and sell the vessel and convert a partial into a total loss, when, if he were uninsured, he might find his interest would be best served by repairing her and proceeding on the voyage. In such a case it appears to me, that if the owner, or the master for him, chooses to sell as the easiest way of extricating him from the disaster by shifting the loss or a part of it upon the underwriters, it must be considered as a voluntary sale, and the seamen entitled to their two months' wages. These are calculations in which the interest the seamen have in prosecuting the voyage and earning their wages, are not taken into the account. The master looks solely to the interests of the owner."

sale of the vessel for some reason occurring after the voyage has begun, as to a case where the original object of the voyage was a sale of the vessel abroad.

110. It should be here observed, that although the Act of Congress declares that the three months' wages shall be paid by the master, and to the consul; yet, if they are not so paid, and the master has returned, they may be recovered here from the owner, by a libel in the Admiralty, and the Court will order them to be distributed to the United States and the seamen, in the proportion directed by the statute.

111. It would certainly seem, that not only the terms of the law, but the objects to be attained by it, to wit, the return of American seamen to their country, and their maintenance when found destitute in a foreign port, all require that this money should be paid to the consul in the foreign port where the seaman is discharged, and that no other payment or obligation to pay is recognised or created by the Act. But upon the ground that the wages would be entirely lost, and the law violated with impunity, were such a construction of the Act to be adopted, the Courts have enforced the payment of the wages here, when the master has refused or omitted to pay them abroad.[1]

[1] Emerson v. Howland, 1 Mason, 45; Orne v. Townsend, 4 Mason, 541; The Saratoga, 2 Gallis. 181; The Dawn, Ware's R. 485; but see *contra* Ogden v. Orr, 12 John's R. 143; The Juniata, Gilpin's R. 193. In this latter case, Judge Hopkinson felt himself compelled, in deference to the opinion of Judge Story, in

112. The Act of 1840,[1] without directly repealing any of the provisions of the Act of 1803, has very

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Orne v. Townsend, *supra*, to secure a payment of the wages, but his own opinion was, that the Act of Congress did not require or permit the payment to be made elsewhere than to the consul at the port of discharge. See also Knowlton v. Boss, 12 Law Rep. 13. It was observed by Judge Sprague, in this case, that the payment of two months' additional wages for discharge in a foreign port, under the Act of 1803, is enforced in Admiralty; "but this," he proceeds to say, "is given specifically, as wages is recoverable only by the mariner himself, and is in fact a kind of statute substitution for his original contract." Knowlton v. Boss, *supra*, was a libel in the Admiralty by a carpenter of a merchant ship against the master. The allegations were, that the master flogged and imprisoned the libellant without justifying cause; refused him leave to see the American consul when reasonably demanded, and compelled him to leave the vessel, whereby he lost his wages for the return voyage. Besides damages, the libel claimed the fine imposed by the 17th section of the Act of 1840, ch. 48. This section provides, that if the master shall refuse to perform the duties imposed by the Act, or shall violate its provisions, "he shall be liable to each and every individual injured thereby, in damages, and shall, in addition thereto, be liable to pay one hundred dollars for each and every offence, to be recovered by any person suing therefor in any Court of the United States, in the District where such delinquent may reside or be found."

Judge Sprague decreed compensation for the punishment, the refusal to see the consul, and the loss of wages. But he had doubts whether the Admiralty had jurisdiction to enforce the fine. "No case," he said, "had been cited of a fine recovered in Admiralty, which was given specifically as a fine, to be recovered by any citizen suing therefor. But if this fine is recoverable in Admiralty, there is an objection to the libellant's uniting in one libel, a claim for personal damages, with a claim for a fine, which he sues for in a different capacity, that of a common informer. I am of opinion that the decree should be confined to damages."

[1] Act U. S. July 20th, 1840, ch. 23, s. 5, 6, 7, 17.

much enlarged the power of consuls, or commercial agents, in foreign ports, to discharge mariners from their vessels. It empowers the consul, or commercial agent, upon application of both the master and mariner, to discharge the latter, if he thinks it expedient, without requiring the payment of three months' wages, under the Act of 1803, or any other sum of money. He may, however, make such terms with the master, as will secure the United States from liability to support the mariner so discharged. The public officer discharging the mariner under this Act, is required to make an entry thereof upon the list of the crew, and upon the shipping articles. When the mariner has deserted, and been reclaimed by the consul, if on inquiry, he finds that the desertion was caused by unusual or cruel treatment, he may discharge the mariner, who shall, in such case, be entitled to receive three months' pay, in addition to his wages to the time of his discharge, and the officer discharging him shall enter upon the crew list and shipping articles, the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially. While the acts of the consul, in pursuance of authority conferred on him by law, bind all parties affected by them, it must be understood that it is no justification for an illegal act of the master, that it was done by the advice or suggestion of an American consul.[1]

[1] Wilson v. The Brig Mary, Gilpin's R. 31. A consul's certificate is not evidence of acts not official, or within his personal knowledge. The Independence, Crabbe's R. 54; see also The Coriolanus, Ibid. 239.

113. To prevent seamen employed in vessels belonging to citizens of the United States, in cases of shipwreck, sickness, or captivity, from suffering in foreign ports, it is made the duty of our consuls, vice-consuls, commercial agents, or vice-commercial agents, from time to time, to provide for the mariners and seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give; and that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls, vice-consuls, or commercial agents, respectively, and to transport them to the port in the United States to which such ships or vessels may be bound, on such terms, not exceeding ten dollars for each person, as may be agreed between the said master and consul, or commercial agent. And the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels, according to their several abilities: Provided, That no master or captain of any ship or vessel shall be obliged to take a greater number than two men to every one hundred tons burthen of the said ship or vessel, on any one voyage; and if any such captain or master shall refuse the same, on the request or order of the consul, vice-consul, commercial agent, or vice-commercial agent, such captain or master shall forfeit and pay the sum

of one hundred dollars for each mariner or seaman so refused; to be recovered for the benefit of the United States, in any Court of competent jurisdiction. And the certificate of any such consul or commercial agent, given under his hand and official seal, shall be *primâ facie* evidence of such refusal, in any Court of law having jurisdiction for the recovery of the penalty aforesaid.[1]

114. It will be observed, that the mutuality of obligation imposed by this statute creates a contract, which, in consideration of support and transportation by the master, obliges the seaman to perform all the duties of one, and creates all the relative obligations and duties of master and servant, which exist in cases of articled seamen. He is liable to be punished for offences committed against any law of the United States, in the same manner and to the same extent as if he were one of the original crew.[2]

115. The action for the penalty denounced by this section of the Act, must be brought in the name of the United States, and not of the consul or vice-consul. The certificate of the consul is *primâ facie* evidence of the refusal of the master to take the seaman on board, and of all the facts stated in the enacting clause of the section, which is necessary to bring the case within the penalty; for all those facts are indispensable to make it "such refusal" as the statute contemplates. The statute intended to make the consul's certificate the proper and ordinary proof,

[1] Act U. S. 28th Feb., 1803, ch. 62, sec. 4.

[2] U. S. v. Sharp, 1 Peters' C. C. R. 118, 121.

though not conclusive proof, of all the facts to sustain a suit for the penalty.[1]

116. If a seaman be entitled to the privileges of an American seaman, and be destitute, the consul is the proper judge on board of what ship he should be placed, for his return to the United States.[2] The mere fact that a seaman has deserted from an American ship, whether she be in port or not at the time when the seaman became destitute, does not supersede the authority of the consul to require another American ship to bring him to the United States. Mere desertion does not oust the consul's authority, or disqualify the seaman from the protection and assistance intended by the Act.[3] Foreigners, while employed as seamen in the merchant ships of the United States, are within the protection of our laws, and are deemed to be "mariners and seamen of the United States" within the language and policy of the Act of 1803, which we are considering.[4]

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[1] Matthews v. Offley, 3 Sum. R. 115; see The Independence, Crabbe's R. 54.

[2] Ibid. [3] Ibid.

[4] Ibid. "It seems to me," said Judge Story, in this case, "that where a foreign seaman has once acquired a domicil in the United States, and is engaged in our merchants' service, and retains, if I may so say, the habits of that service, and upon every discharge from one ship still has the *animus revertendi* to that service and domicil, he must be treated as intending to retain his acquired character of an American seaman, and his acquired American domicil. Some overt act on his own part, such as engaging in some foreign service, or resuming his original native character, or disowning his American character and domicil, seems to me indispensable to rebut the presumption that he still attaches himself to the American service. It does not strike me, that his

117. By the Act of 1825,[1] Congress struck directly at the unlawful discharge of mariners abroad. That Act provides, that if any master or commander of any ship or vessel, belonging, in whole or in part, to any citizen or citizens of the United States, shall, during his being abroad, maliciously and without justifiable cause, force any officer or mariner of such ship or vessel on shore, or leave him behind, in any foreign port or place, or refuse to bring home again, all such of the officers and mariners of such ship or vessel, whom he carried out with him, as are in a condition to return, and are willing to return, when he shall be ready to proceed on his homeward voyage, every master or commander so offending, shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding six months, according to the aggravation of the offence."

118. The section of the Act which we have here recited, enumerates three distinct and independent offences. First, The maliciously, and without justi-

desertion from another American ship, at least unless followed up by engaging in some foreign service, ought to have such an effect. If his desertion be without good cause, and unjustifiable, although he has broken the shipping articles on his side, it is not dissolved. He cannot shake off his contract in this way. He is still, in contemplation of law, a seaman of the ship from which he deserted, and may be compelled to return to duty. If, on the other hand, upon his desertion, the master justifiably declines to take him on board again, and cuts him adrift from the ship's service, he will then be discharged from the ship's service; but it by no means follows, that he is to be deemed discharged from the American marine service altogether, or that he has ceased, *ipso facto*, against his will, to be entitled to the protection of American seamen."

[1] Act U. S., ch. 276, sec. 10.

fiable cause, forcing any officer, or mariner, on shore in any foreign port; Secondly, The maliciously, and without justifiable cause, leaving such officer, or mariner, behind in any foreign port; and Thirdly, The maliciously, and without justifiable cause, refusing to bring home again, all the officers and mariners of the ship in a condition to return and willing to return on the homeward voyage. It is sufficient, therefore, to constitute an offence within the true intent of the statute, if the officer, or mariner, is either forced on shore or left behind, or refused to be brought home. Hence, in a case where a mariner applied for a discharge, which was refused by the master, and in consequence used abusive language, for which he was imprisoned, so that he was unable to return, and the ship sailed without him; it was held, that the leaving him behind was an offence within the intent of the Act of 1825.[1]

119. Neither of the offences, enumerated and contemplated by this Act, is committed, if the master acted from a justifiable cause. That is to say, there is no violation of the law, if the forcing ashore, or leaving behind, or refusing to bring home, any officer or mariner, proceeded from a justifiable cause. Justifiable cause, in the sense of the Act, does not mean such a cause as in the mere maritime law might authorize a discharge; but such a cause as the known policy of the American laws on this subject contemplates, as a case of moral necessity, for the safety of the ship and crew, or the due performance of the voyage.[2]

[1] U. S. v. Netcher, 1 Story's R. 307.

[2] U. S. v. Coffin, 1 Sum. 394. "I think," observed Judge

120. While, therefore, a justifiable cause for the commission of either of the acts enumerated by the statute, exonerates the master, and is a sufficient defence to an indictment therefor, the absence of such justifiable cause is not alone sufficient, on the other hand, to convict him. Want of justifiable cause and malice must concur to constitute either of the offences contemplated by the Act. Maliciously, in the sense of the statute, is not limited to acts done from hatred, revenge, or passion; but it includes all acts wantonly done, or wilfully done—that is, against what any man of reasonable knowledge and ability must know to be contrary to his duty. The law presumes every man to know what in point of duty is required of him in his station. However, if in any particular case, the circumstances are such that a master of reasonable judgment, acting *bona fide*, and not from passionate excitement, might fairly deem it his duty to discharge a seaman, or leave him behind; he will not be guilty of the offence intended by the Act.[1]

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Story, in this case, that "the right" (of discharge) "arises only under extraordinary emergencies and in extreme cases, when otherwise the safety of the officers or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline, would be put in jeopardy. The mere convenience of the master would not justify a discharge, much less such offences as could be ordinarily suppressed by the common punishments administered in the sea-service."

[1] Ibid. United States v. Ruggles, 5 Mason, 192; Phillips's case, 1 Moody, Crown Cas. 264, 273. "By 'maliciously,' in the intendment of the statute," said Judge Story, in U. S. v. Ruggles, *supra*, "is not merely meant a wicked, malignant, and revengeful act, such as in cases of murder, constitutes malice, and

121. The master has a right, under the general maritime law, to discharge a seaman in a foreign port. But it must be done for a sufficient cause. It must be some offence of a high and aggravated character, or long and habitual disregard of duty, or other continued misconduct, unrepented of and unchanged. But the laws of the United States, from motives of an enlarged policy, have circumscribed the authority of the master in cases of discharge within much more narrow bounds. His right, under these laws, can result only from what may be deemed a moral necessity, analogous to the cases put in the Act of 1803.[1] Certainly, he would be justified in discharging a seaman, if his presence on board would jeopard the safety of the officers, or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline.[2] And whenever the misconduct has been such as to render the discharge of the seaman imperatively necessary for the safety of the ship, and the due preservation of disci-

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which flows from a heart regardless of social duty, and fatally bent on mischief. But if the act be wantonly done, that is, with a wilful disregard of right or duty, it is, in the sense of the statute, malicious. It must be a wilful act, done contrary to a man's own convictions of duty. If, therefore, the defendant did the act from good motives, and under a mistaken sense of duty, and not from a spirit of hatred, or with an intention to oppress, then he ought to be acquitted, notwithstanding the want of justifiable cause. But if he did the act contrary to his own sense of duty, as a mere exercise of power, without any sense of its being right, then it was 'maliciously' done in the sense of the statute."

[1] U. S. v. Coffin, 1 Sum. R. 394. Act of 1803, ch. 62, secs. 1, 3.

[2] Ibid.

pline, the discharge operates a forfeiture of the wages.[1]

122. The cases stated in which a master is permitted to discharge a seaman, are, when he is incorrigibly disobedient, and will not submit to do his duty, or if he is mutinous and rebellious, and persists in such conduct, or is guilty of gross misconduct, or dishonesty, as embezzlement or theft, or if he is an habitual drunkard, and a stirrer up of quarrels and broils, to the destruction of the discipline of the crew; or, by his own fault, renders himself incapable of performing his duty.[2] In short,

[1] The Blake, 1 W. Rob. R. 75; Smith v. Treat, Davies' R. 266. It was held in this latter case, that the arrest and imprisonment of a seaman in a foreign port, and sending him home by the public authority as a prisoner charged with an indictable offence, does not necessarily constitute a bar to a claim for wages for the voyage. Such proceedings do not preclude the Court from inquiring into the merits of the case, and making such a decree as the justice of the case requires. The simple fact that a seaman is arrested and sent home as a prisoner, does not prove him guilty of the offence with which he is charged. It may turn out upon investigation that there was no offence committed, no imperative necessity for his arrest, either for the safety of the ship, or the preservation of discipline; and consequently no forfeiture of wages.

[2] Hutchinson v. Coombs, Ware's R. 65; Thorne v. White, 1 Peters' Ad. R. 175; Relf v. The Maria, Ibid. 186; Black v. The Louisiana, 2 Ibid. 262; Laws of Oleron, art. 6–13; Cleirac, 51, 52; Consulat de la Mer, ch. 267; Laws of the Hanse Towns, 29, 45; Laws of Wisbury, 18, edit. of Cleirac; Smith v. Treat, Davies R. 266. Judge Ware, in this case, delivered a very able and interesting opinion. "Generally speaking," he observed, "the causes which justify the master in discharging a seaman before the termination of the voyage, and especially in a foreign port, are such as amount to a disqualification, and show him to be unfit for

when his conduct is of such a character as shows that he is an unsafe or unfit man to have on board, he may be discharged. Ordinarily, however, the law will not justify the master in dismissing a seaman for a single offence, unless it be of a high and aggravated character, implying a deep degree of moral turpitude, or a dangerous and ungovernable temper or disposition. It looks on occasional offences and outbreaks of passion, not so frequent as to become habits, with indulgence, and by maritime Courts it is administered with levity and a due regard to the character and habits of the subjects to whom it applies.[1]

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the service he has engaged for, or unfit to be trusted in the vessel. They are, mutinous and rebellious conduct, persevered in, gross dishonesty, or embezzlement, or theft, or habitual drunkenness, or where the seaman is habitually a stirrer up of quarrels, to the destruction of the vessel and the discipline of the crew." See also Bee's R. 148, 184; The Lady Campbell, 2 Hagg. Ad. R. 5; The Vibilia, Ibid. 228; Townsend v. Orne, 4 Mason, 541; The Ship Mentor, Ibid. 84; Buck v. Lane, 12 S. & R. 266; Atkyns v. Burrows, 1 Peters' Adm. 244; The Nimrod, Ware's R. 9.

[1] Smith v. Treat, supra. "In the American Courts, the right of the master to discharge a seaman for misbehavior, has been often recognised. But the right is qualified by many limitations. He has not a right to discharge him for trifling, or venial offences, or in the mere exercise of his own discretion. There must be misbehavior of a gross and aggravated nature to justify a discharge; otherwise the master and owners will be liable in damages. Judge Peters has held, that if a seaman is incorrigibly mutinous and disobedient, persisting in his misconduct; if he is guilty of gross crimes and dishonesty; if he is an habitual drunkard, and purloins the ship's stores; in these and the like cases, he may be discharged. But if his offence is but temporary and fugacious; if he is repentant and willing to return to duty; then the master has no right to dismiss him." Story's Abbott, p. 263.

123. It is not the simple averment by the master that the seaman was a dangerous man, that will induce a Court of Admiralty to sanction his discharge. When he assigns this, in a Court of justice, as a reason for setting aside the obligation of a contract, it is the duty of the Court to look into the grounds of his apprehension. It is not the vain fear, *hominis cujusdam meticulosi*, that will justify the master in dissolving the contract. It must be such fear as may be supposed to affect the mind of a man of ordinary firmness.[1] The law is accommodated to the character of the sailor, and ordinarily, even in aggravated cases, if he repents and returns to his duty, the master is bound to receive him on board again.[2] "Even in cases of aggravated offences," says Mr. Curtis,[3] "or of a continued course of conduct which would justify the discharge of a seaman, if he repents and offers amends, the principle which is always operative in his favor against all kinds of forfeiture, with very rare exceptions, intervenes to restore him to his rights, and he is ordinarily entitled to be received again on board. To deprive a mariner of the benefit of this rule, it should appear that the misconduct amounts to a radical *disqualification*, as dishonesty and habitual drunkenness in a steward; or that the party is really dangerous to the peace and safety of the ship."

124. It may be superfluous to add, that if the master improperly discharges a seaman, he and the

[1] The Nimrod, Ware's R. 9.

[2] Ibid.

[3] Merchant Seamen, p. 150.

owner become responsible for damages.[1] The measure of damages in such a case is actual compensation for the injury, according to the circumstances. The amount of damages is neither to be determined by the amount of wages which would be due, computed to the successful termination of the voyage, nor computed to the time of his own return to his country, but should be an indemnity for the actual injury sustained by the breach of the contract.[2] Judge Ware subscribed to this doctrine, in the case of Hutchinson v. Coombs, and decreed wages for the

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[1] Johnson v. Dalton, 1 Cowen's R. 543; Atkyns v. Burrows, 1 Peters' Adm. R. 244; Halle v. Heightman, 2 East's R. 145; Hutchinson v. Coombs, Ware's R. 65.

[2] Emerson v. Howland, 1 Mason's R. 45. The reader will find the authorities upon the point discussed in the text, collected in Flanders' Maritime Law, p. 377. It is there laid down, "that if a seaman is wrongfully discharged during a voyage, he is entitled to a compensation for the injury, according to the circumstances of his own particular case. This is ordinarily measured by the loss of time and the expenses of his return to the country where he was originally shipped. In some cases wages have been allowed up to the prosperous termination of the voyage, and in others up to the time of the seaman's return to the country where he was originally shipped, without reference to the termination of the voyage. If the seaman has obtained employment in the mean time, his earnings are deducted, not from his wages, but from the expenses of his return. If, in addition to the wrongful discharge, the master detains the seaman's clothing, he may recover the value of it in the common libel for his wages." But see *contra*, Abbott on Shipp. 733; The Elizabeth, 2 Dods. Adm. R. 403. "Nothing," said Lord Stowell in this case, "can be more generally or more peremptorily laid down, than that a master discharging a seaman wrongfully is answerable for the whole wages of the voyage of that ship." The rule of American Law is clearly the opposite of this, and stands upon grounds of substantial equity.

whole voyage as the measure of damage in that case. He also held, that the intermediate earnings of the seaman were to be deducted, not from his wages, but from the expenses of his return.

125. It will be seen, by reference to the Act of 1803, that the consul's certificate that a seaman was discharged with his approbation, will be a sufficient defence to an action for the penalty of the master's bond to the government, but it is not a sufficient defence to an action by the seaman for damages. The Court will go behind the certificate and inquire into the cause of the discharge, and award damages, if the circumstances of the particular case render it proper.[1]

### II. OF THE MATE AND INFERIOR OFFICERS.

126. The authority of the master extends over the mate and the other officers of the ship, and he may discharge them abroad for adequate cause, as well as the common mariners. But it can only be done in a clear case, and on good grounds. Absolute necessity almost is required to justify the measure. At first blush it may seem that officers do not present so strong a title to the indulgence and favorable attention of a Court of Admiralty as common mariners; who are, from their ignorance and helpless state, placed in a peculiar manner under its tender protection. But there are other grounds on which officers are justly objects of equal attention, inasmuch as an injury done to their character is of

[1] Hutchinson v. Coombs, Ware's R. 65.

wider extent, and attended with consequences of a more serious nature. Mariners, if distressed in one service, may easily obtain another, and a sailor may remain a sailor to the end of his days, as it is not usual to be minute in the inquiry made into their characters. But if an officer is discharged for insufficiency, it may not be easy for him to procure another situation; and he is in danger of losing, not only his present footing, but more particularly those prospects of promotion, which depend in a great measure on the character that has travelled along with him during his former employs, and has been the most valuable fruit of a life of service. These considerations are sufficient to place officers also under the particular protection of the Court. It must not be understood, however, that such a blind indulgence will be shown as to overrule the real justice of the case. It is only such an indulgence as the equitable considerations of public utility require, which can seldom in such cases, any more than in others, be separated from particular justice.[1]

[1] Galloway v. Morris, 3 Yates, R. 445; The Ship Exeter, 2 Rob. Ad. R. 261; Atkyns v. Burrows, 1 Peters' Ad. R. 246. "When I first came into this Court," observed Judge Peters, in this case, "I found it taken for granted that the captain had a legal right to displace the mate for just cause. I have seen repeated instances where the exercise of this power was necessary for the safety of the ship; and I have examined into many cases wherein it had been executed from arbitrary, capricious, and improper motives. It is established by the maritime laws, and so it ought to be, that the captain must be supreme in the ship. His lawful orders must be obeyed. But when a contract is in question, the law, by its proper Courts, will see that it is not vacated for any other than legal, reasonable, and necessary causes. The Courts will control and examine the powers and conduct of the

127. It was said by Lord Stowell in the case of The Exeter, which is cited in the margin, that in a matter so tender as the discharge of an officer, the master ought to call the attention of the passengers and crew to the circumstances attending it, that the propriety of the act may be properly warranted and

master. He is authorized to give all commands for the navigating, government, and safety of the ship; but he has no authority to nullify a contract at his will, or for light and trifling causes. A contract is a solemn engagement, not to be vacated without the consent of all parties, or on considerations on which the law must decide through the tribunals established to make such decisions." The mate in this case had not been discharged abroad, but displaced and turned before the mast, on the ground of gross negligence. The Court held that he had been illegally displaced, that he was entitled to wages agreeably to his original contract as mate, and that if any loss had accrued, on account of his being unlawfully displaced, the master must answer. Being displaced for insufficient cause, the mate could maintain an action for the breach of his contract, and recover damages according to the circumstances.

Judge Peters, in his opinion, which deserves attention, assigned the causes for which a mate may be degraded. "He may forfeit his right to command and wages," he says, "by fraudulent, unfaithful, and illegal practices; by gross and repeated negligence, or flagrant, wilful, and unjustifiable disobedience; by incapacity, brought on him by his own fault, to perform his duty, or palpable want of skill in his profession." The rules here laid down were acceded to by Judge Washington, in the case of Thompson v. Busch, 4 Wash. C. C. R. 338. The relative duties of the inferior officers and seamen to the master, and of the master to them, are defined in a liberal and equitable spirit, and with great precision in that case. If Judge Washington did not possess those accumulated stores of legal and various learning, which were the ornament and distinction of some of his contemporaries, he amply atoned for any want of them by the justice of his views, the patient industry of his habits, and the accuracy and impartiality of his judgment.

vouched by as much evidence as possible. When a mate or other inferior officer is disrated, as he may be for incapacity, and other causes stated by Judge Peters in the case of Atkyns v. Burrows, which are cited at length in the marginal note, he does not thereby become a *quasi* passenger, and therefore exempt from the performance of other duty. He cannot by his own misrepresentation as to his qualifications deprive the ship of the services of an important officer, and by making her short-handed, increase the hazard and add to the labors of all others, while he eats the bread of idleness, and is only an incumbrance on the ship.[1]

128. The mate is a respectable officer in the ship, and generally chosen with the consent of the owners. He is under the orders of the master in his ordinary duty; but his contract is not subject to arbitrary control. If displaced, it must be for causes evident, strong and legally important.[2] There is an implied warranty in the mariner's contract, that the party is competent in knowledge and bodily health to the

[1] Morris v. Cornell, 6 Law Rep. 304. "I have no doubt," observed Judge Sprague, "that Morris (the libellant), when he shipped, thought he should be able to perform the duties of second mate. I acquit him of all designed deception. Still it was obligatory on him to know his qualifications, and if in fact found to be unfit for a portion of his duties, he was still bound to have performed others. In refusing all duty, therefore, he was wrong, and set an example of insubordination and disobedience, which the master had a right to punish. He had a right to coerce him to submission."

[2] Atkyns v. Burrows, *supra*. The Ship Orozimbo, 1 Peters' Ad. R. 250; Wood v. The Nimrod, Gilpin's R. 83.

station for which he contracts. If he contracts for a particular service or duty on board a vessel he engages both for fidelity in the performance of that duty, and for that capacity and those qualities which will enable him to perform the service in a satisfactory manner. If the master finds, upon trial, that there is on the part of the mate either a want of fidelity or a want of capacity which disqualifies for the service, he will be justified in putting him upon a different duty. This, however, cannot be done capriciously. There must be reasonable and legal cause. When such cause exists, the master will be justified, not in refusing altogether to pay him wages, but in making from them a reasonable deduction.[1]

129. When, however, the master is acquainted with the capacity and state of health of the party, he makes the engagement under a knowledge of the true state of his nautical abilities and deficiencies. There is no fraud or imposition practised. The master has contracted for imperfect service, and he must be content with it. True, if the necessities of the ship demand that the party should be displaced, the master is authorized to displace him. The exigency of the case is his justification. But he would have no right, I apprehend, either to deny him the

[1] Wood v. The Nimrod, Gilpin's R. 83; Sherwood v. M'Intosh, Ware's R. 109; Curtis's Merchant Seamen, 29; The Richmond, 2 Peters' Ad. R. 263; Forbes v. Parsons, Crabbe's R. 283. It was held by Judge Hopkinson, in this case, that when a party ships for a particular employment, and either will not or cannot perform its duties, if his deficiencies arise from wilfulness or obstinacy, he is a fit object for punishment; if from incapacity, he is entitled to no particular favor of the Court.

stipulated wages, or to put him upon other service. It would be violative of the most obvious principles of justice and fair dealing to permit a master to contract with a seaman for a particular service, knowing his incapacity to perform it, and then, having the man in his power, to put him to the performance of other duties, for which he did not contract, and for which, perhaps, originally, he would not have contracted. Such a doctrine would enable a master, under pretence of employing them in one service, but with the intention of employing them upon another, to inveigle men on board his ship, to get indirectly service which he could not perhaps obtain directly.[1]

130. If one ships as an officer or mariner, and represents himself as an able-bodied seaman, and it turns out that he was affected with a fatal disease, of which he dies during the voyage, his administrator has no claim for wages. It was a fraud on his part to have represented himself as able-bodied, and therefore no foundation for a claim of wages is laid.[2] Temporary appointments made by the master on an emergency, such as the appointment of a common sailor to the position of mate, stands on a very different footing from that of a mate originally shipping as such; making his contract for the office, and for the wages belonging to it. Such appointments are held at the master's pleasure. They are mere experiments, of the success of which he is to judge.[3] If the seaman, placed in the position of mate, per-

[1] The Ship Orozimbo, 1 Peters' Ad. R. 250.

[2] The Richmond, *supra*. [3] The Nimrod, Gilpin's R. 83.

forms the duties attached to that office, he will be entitled to the wages of a mate. If he fails to perform them, and is remitted to his original post, he cannot, it seems, recover mate's wages during the time he was on trial.[1]

131. When the master dismisses or disrates the mate or other officers, or the mariners, and an action is brought against the owners for the stipulated wages of such dismissed or disrated officer or mariner, the master is not a competent witness without a release from the owners.[2] The reason assigned for his exclusion by Judge Peters, in the case of Malone v. The Brig Mary,[3] was, that the master is interested in the result, though not immediately; that if a decree passes against the seaman in a procedure *in rem*, or against the owner, it may be given in evidence to repel a suit against the master. But in Johnson v. Huckins,[4] where the competency of the master as a witness against a mariner, in a suit for wages, brought by him against the ship or owners, came in question, he was admitted *de bene esse*. The point, however, was not definitively settled. But Judge Sprague denied the reason for exclusion given by Judge Peters, as above stated, that a decree against the seaman in a suit against the owner, could be given in evidence to repel a suit against the master.

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[1] The Nimrod, Gilpin's R. 83.

[2] The Ship Exeter, 2 Rob. Ad. R. 261; Galloway v. Morris, 3 Yates' R. 445; Malone v. The Brig Mary, 1 Peters' Ad. R. 139.

[3] 1 Peters' Ad. R. 139, supra.

[4] 6 Law Rep. 311.

132. Upon the death or sickness of the master, or from any other cause that renders him incapable of having the command, the mate succeeds to his place *virtute officii*, by mere operation of law. The law throws this duty and obligation upon him; he acts in the stead of the master, in all cases where the latter is dead or absent, or incapable, as from insanity.[1] It is the doctrine of the cases, however, that a mate succeeding to the command of the ship, does not in consequence lose his character as mate. He is accountable only for his own transactions. If put on shore from sickness, for the convenience of the ship, his expenses for medicine, advice, attendance, and board, are to be borne by the ship-owner. Acting

[1] The Brig George, 1 Sum. R. 151; Orne v. Townsend, 4 Mason's R. 541; Pray v. Stinson, 21 Maine, 402; 2 Sum. 584; Copeland v. New England Marine Ins. Co., 2 Met. R. 432; The Favorite, 2 Rob. R. 232; Read v. Chapman, 2 Strange R. 937. It is assumed by these cases, that the mate, in succeeding to the office of master, does not thereby cease to be mate; that he is not master, but *quasi* master, *pro hac vice*. That he succeeds as *hæres necessarius* to the employment of the master, in a case of necessity. We have ventured elsewhere to express the opinion, that while the mate, by appointment of law, is clothed with all the powers and responsibilities of master, is acting in his place and stead, he is *pro tempore* master, subject to the liabilities, and entitled to the privileges, that belong to that position. In other words, that he is not mate for one purpose, and *quasi* master for another. The office being imposed upon him by the law, he is not burdened with the obligations of his predecessor; that is to say, his duties and obligations have their inception from the moment he assumes the command. He is not liable, for example, for the seamen's wages, as a substituted master is. The law does not impose upon him personal liability for contracts made by another, but holds him accountable for the performance of every duty connected with the post, after he has assumed it.

as master, he is entitled to an additional compensation therefor, which he may recover by a libel in the Admiralty.[1]

133. Liable, therefore, as the mate is, to have the command and navigation of the vessel thrown upon him, the law imposes it as a duty upon the owners, to see that a competent person fills that post. He must be qualified in point of general capacity for the office of master. He must be completely skilled in theoretic and practical navigation, and general seamanship, for the duty of taking command in case of exigency. And it has been held, that a vessel cannot be deemed seaworthy, which has not on board some person capable of navigating her, besides the master.[2] This doctrine, however, in all its extent, has not commanded universal approval. It stands opposed by the great authority of Chancellor Kent, as well as the opinions of Prof. Greenleaf, and Sir J. Campbell. "There is not an instance," says Chancellor Kent, "in all the infinite and vexatious discussions in maritime insurance cases in the Courts within the United States, in which such a stern construction of the warranty of seaworthiness has been stated or suggested." This was said, however, before the decision in the case of Copeland v. New England Marine Ins. Co., where the doctrine of Lord Tenter-

[1] See the cases cited, *supra*. The mate, acting as master, is intrusted with the government and management of the crew, and if he wrongfully discharges a seaman, the owners are liable. Orne v. Townsend, *supra*.

[2] Copeland v. New England Marine Ins. Co., 2 Metcalf, 432; Clifford v. Hunter, 3 Car. & P. 16.

den, in Clifford v. Hunter, was expressly recognised. Prof. Greenleaf, and Sir J. Campbell, did not take such strong ground against the rule as Chancellor Kent, but were of opinion, that while there is not any fixed rule of law which makes it necessary that the mate should be a navigator, capable of keeping the ship's reckoning, in all cases, be the voyage what it may, it was nevertheless a question of fact for the jury upon the circumstances and nature of the particular voyage.[1] This limitation of the doctrine, would conserve the rights of all parties. "To place our American coasting, and West India voyages, within the discipline of Lord Tenterden's rule," says Chancellor Kent, in the opinion above referred to, "would be monstrous. It would destroy a large majority of all the policies effected on that trade within the last thirty years, in our American insurance offices, and which is generally carried on in small vessels, such as sloops, schooners, brigs, &c." That such consequences might follow from the adoption of Lord Tenterden's doctrine, as an inflexible rule, applicable to all voyages, furnishes a strong reason in favor of the limitation of it, which we have mentioned.

134. Having said thus much of the powers and duties of the mate, it remains to observe, that one of the most important duties devolved upon him, is, that he should exercise great vigilance and attention for the preservation of the cargo against attempts

[1] Vide the opinions of those gentlemen given in a case which arose in Canada some twelve years since, in the Law Rep., vol. 1, 257.

at robbery or embezzlements. He is not by any means responsible for all the robberies committed on board the vessel. He is bound to exercise due care, vigilance and caution; but if, notwithstanding, embezzlement occurs without his knowledge or participation, he is not responsible.[1] Many of his duties depend on usage, which furnishes the rule of law. By usage, it belongs to the mate to superintend the receiving, and storing, and delivery of the cargo. By usage, it is his duty to keep the log-book, wherein should be kept a minute and faithful history of the voyage. Responsible to the master for the propriety of his commands, he may nevertheless give orders to the crew, which they are bound to obey. They are bound to obey, because otherwise it would be impossible for him to superintend the sailing of the vessel, which is his peculiar function, acting, however, in that capacity, as in others, as the representative and aid of the master. But the mate has no power, when the master is on board, to inflict punishment upon a sailor, unless in a case of absolute necessity, to enforce the performance of duty.[2]

### III. OF THE ACTS FOR THE RELIEF OF SICK AND DISABLED MARINERS.

135. The Acts of Congress respecting hospital money, and the relief of sick and disabled seamen,

[1] The Duchess of Kent, 1 W. Rob. Ad. R. 285.

[2] Curtis's Merchant Seamen, 94, 100; Jacobson's Sea Laws, Book 2, ch. 2; Thompson v. Busch, 4 Washington, C. C. R. 338; Thomas v. Lane, 2 Sum. R. 1; U. S. v. Taylor, Id. 584; Butler v. M'Lellan, Ware's R. 219; Wilson v. The Belvidere, 1 Peters' Ad. R. 258.

provide suitable means for the relief of seamen in the home ports; and may be deemed auxiliary to the maritime law. They reach cases where the maritime law gives no relief; and are far different in their scope and operation from mere cases of injuries and sickness, while in the ship's service, which are considered in another chapter. They are founded upon the great national policy of providing means for the relief of seamen, who are sick and disabled, by withdrawing a small fund, from time to time, from their maritime earnings. They compel seamen to contribute somewhat in the day of their prosperity towards their own relief, when sickness and casualties overtake and cripple them.[1]

136. The Act of 1798[2] provides, that the master, or owner, of every ship or vessel of the United States, arriving from a foreign port into any port of the United States, shall pay to the Collector, at the rate of twenty cents per month, out of his wages, for every seaman employed on board of the vessel, since she was last entered at any port of the United States. Another section extends the like provision to vessels engaged in the coasting trade. By the same Act,

[1] Reed v. Canfield, 1 Sum. R. 200.

[2] Chap. 94. By the Act of March 1, 1843, the provisions and penalties of the Act of 16th July, 1798, entitled an Act for the relief of sick and disabled seamen, be and the same hereby are extended to the masters and owners, and seamen of registered vessels, employed in carrying on the coasting trade; and the Secretary of the Treasury is authorized and directed to issue such instructions to the Collectors of the various ports as shall secure the collection of hospital money from said seamen, masters, and owners.

the President of the United States is authorized, out of the funds so raised, to provide for the temporary relief and maintenance of sick and disabled seamen in the hospitals, or other institutions, now established in the ports of the United States; or, in ports where no such institutions exist, in such other manner as he shall direct; provided, that the moneys collected in any one district, shall be expended within the same. And the surplus is reserved as a fund for the erection of hospitals for the accommodation of sick and disabled seamen.[1]

137. It seems that the Acts of Congress, for "the relief and maintenance of sick and disabled seamen," have been practically construed not to impose upon ships and vessels in the whale and other fisheries, the payment of hospital money; and it is most natural to presume, under such circumstances, that Congress intended the benefit for those who were to bear the burden. Upon this point, in the case of Reed v. Canfield, Judge Story declined to give any opinion. He said, however, that it certainly was questionable, whether all seamen whatsoever (and whalemen and fishermen are seamen in the sense of the marine law), are not within the scope of the Acts; and if they are, no executive instructions can lawfully narrow them.

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[1] Ibid. Reed v. Canfield, *supra*.

## CHAPTER VI.

### OF THE MASTER'S AUTHORITY AS TO THE EMPLOYMENT OF THE SHIP.

138. Having treated in the previous chapters of the qualifications, hiring, discipline, and discharge of seamen, and of the laws for their protection, security, and relief, we are naturally led in the progress of our subject to consider the powers and duties of the master with respect to the ship and cargo, and his relation to the ship-owner and the freighter of goods. The first step towards this end will be to trace the power of the master as to the employment of the ship.

139. It is the established law of commercial states, that the owners of a trading ship are bound to the performance of every lawful contract made by the master, relative to the usual employment of the ship. The course of usual employment is evidence of authority given by the owners to the master to make for them and on their behalf, a contract relating to such employment; and therefore a contract so made by him, the law esteems to have been made by them. At the same time, it must be understood,

that the master is answerable for his own contract. The law gives the merchant a twofold remedy against the owner and the master.[1]

140. Under his general authority, the master has a right to charter the vessel in a foreign port, the owner having no agent there, and perhaps in a domestic port, if at a distance from the place of the owner's residence, and the means of communication are difficult.[2] It is well settled, however, that the

[1] Abbott on Shipping, p. 157. "It is true," says this author, "that the master also is answerable for his own contract; for in favor of commerce the law will not *compel* the merchant to seek after the owners and sue them, although it gives him the power to do so; but leaves him a twofold remedy against the one or the other. But in pursuing this remedy, care must be taken to describe the defendant according to his real character. For in an action at law, brought against a person as master, at the trial whereof it appeared upon the proof that the defendant was not master, but owner, the plaintiff failed in his suit. This rule of the law of England agrees with the law of other commercial nations. When the Romans began to engage in commerce, a new species of action under a particular name appears to have been introduced, to ascertain and enforce this responsibility of the owners for the acts of their servants; and by the Prætorian edict, the owners, or (to render the Latin word more nearly) the employers of the ship, are made responsible for the faults of the mariners and master, and for the contracts also of the master; but not for the contracts of the mariners, because the mariners are not appointed for the purpose of conducting the business of the ship, but only of laboring in its navigation under the orders of the master." See the Dig. lib. 14, tit. 1.

[2] Hurry v. Hurry, 2 Wash. C. C. R. 145; Murfree v. Redding, 1 Hayw. R. 276. See also as to the power of the master to make contracts, Gernen v. Cockran, Bee's Adm. R. 209; Emery v. Hersey, 4 Greenleaf, R. 407; Reynolds v. Toppan, 15 Mass. 370; Taggard v. Loring, 16 Id. 336; Boucher v. Lawson, Temp. Hard.

master has no power, merely in his character of master, without a superadded agency, to bind the owners by a charter-party under his hand and seal, so as to subject them to an action of covenant thereon.[1] Whatever contracts the master makes in the course of the voyage, within the scope of his employment, bind the owner or a purchaser. A purchaser takes the ship subject to all incumbrances, and to all lawful contracts which the master had before made or afterwards made respecting the employment of the ship. Whatever contracts he may lawfully make as the master of the original owner, he may still lawfully make after the transfer, until he has notice of it.[2]

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85, 194; King v. Lewis, 19 John. 235; Pope v. Nickerson, 3 Story's R. 479.

The master may exempt himself from personal liability by a special contract to that effect, or he may be exempt if the credit was specially given to the owners. Hoskins v. Slayton, Cases, Temp. Hard. 360; James v. Bixby, 11 Mass. 34; Maryland v. Webb, 16 John. 89; Palmer v. Davis, 1 Term. R. 108; Hussey v. Christie, 9 East's R. 432.

[1] Pickering v. Holt, 6 Greenl. R. 160.

[2] Portland Bank v. Stubbs, 6 Mass. 422; Badlam v. Tucker, 1 Pick. 389. In Grant v. Norway, 2 Eng. Law and Eq. R. 337, Jervis, C. J., said: "The authority of the master of a ship is large, and extends to all acts that are usual and necessary for the use and management of the vessel, but it is subject to several well-known limitations. He may make contracts for the hire of the ship for carrying, or he may vary that which the owner has made; he may take up moneys in foreign ports, and, under certain circumcumstances, at home, for necessary disbursements for repair, and bind the owners for repayment; but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may contend that it is. He may make contracts to carry goods on

141. When a vessel is intended to be employed as a general ship, and the owners do not interfere with the receipt of the cargo, they are bound by the contracts of the master, notwithstanding the ship may be at the place of their residence. When an owner is on board, and exclusively attending to the shipment of the cargo, he is not bound by the master's contract. But to relieve himself from liability, he must show the fact that he was exclusively attending to the shipment of the cargo.[1] The course of usual employment is evidence of authority given by the owner to make a contract for him.[2] The right of the master to make a charter-party in the home port of the owners, cannot be ordinarily presumed from his character as master. It is not an incident to his general authority; nor can it be presumed as an ordinary superadded agency. But if he has been permitted to make such contracts in former voyages, it may be presumed that the authority has been con-

freight, but cannot bind the owner to carry freight free. So, with regard to goods put on board, he may sign the bill of lading, and acknowledge the nature, quality, and condition of the goods. Constant usage shows that the master has a general authority; and if a more limited authority is given, the party not informed of it is not affected by such limitation. The master is a general agent to perform all things relating to the usual employment of his ship; and his authority, as such agent, to perform all things as are necessary in the line of business in which he is employed, cannot be limited by any private orders not known to the party in any way dealing with him." See also Smith's Mercantile Law, 559. It may be added, that the master has no right to pledge the freight for his private purposes. 2 Wash. C. C. R. 297.

[1] Ward v. Green, 6 Cowen, 173.

[2] Id. King v. Lennox, 19 John. R. 235.

ferred on him for future voyages.[1] The master in his character as master, has no authority to procure insurance, nor is he in any sense an agent for such purpose, or in any way connected with it.[2]

142. The authority of the master to sign bills of lading, may be derived either from express delegation of the owner, or from the usual course of business or employment. The captain of a vessel engaged in the freighting business, who is in the habit of receiving goods for hire, and signing bills of lading, has authority to bind the owners as much as if the authority were expressly given.[3] All parties concerned have a right to assume that the agent has authority to do all that is necessary; but the very nature of the bill of lading shows that it ought not to be signed till the goods are on board, for it begins by describing them as "shipped." And hence the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board.[4]

143. Ordinarily, the master is a stranger to the cargo, beyond the purposes of safe custody and conveyance. But in cases of instant and unforeseen and unprovided for necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the gene-

[1] The Schooner Tribune, 3 Sum. R. 144.

[2] Gen. Int. Ins. Co. v. Ruggles, 12 Wheat. R. 408; Patterson v. Chalmers, 7 B. Monroe's R. 595.

[3] Nichols v. De Wolf, 1 Rhode Island R. 277.

[4] Grant v. Norway, *supra*. Vide post, part 2, tit. "Conveyance of Goods in a General Ship."

ral policy of the law.[1] Ordinarily, however, his power relates merely to the carriage of goods, and the supplies requisite for the ship; and the owner of the ship cannot be bound by any contract of the master concerning the purchase of the cargo. To bind the owner in such a contract, he must have a special authority.[2] That authority will be presumed, if the owners have permitted the master to purchase on their account, or have ratified such acts when known to them. By so doing they have held him out to the world as their agent authorized to purchase, and are justly bound by his acts.[3]

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[1] The Gratitudine, 3 Rob. Ad. R. 240.

[2] Hathon v. Curtis, 8 Greenl. R. 356; Hewitt v. Buck, 17 Maine, 153.

[3] Hewitt v. Buck, *supra*. The captain of a steamboat has authority to contract for freight or passengers, to be carried according to the usual trade of the boat; and the owners are bound by such contract, even without their assent given thereto. And he is personally liable for the diligence of all persons, even for a pilot appointed by the owners, and for injuries resulting from want of due care. In the case of Denison v. Seymour, 9 Wend. R. 1, Savage, Ch. J., in giving the opinion of the Court, said: "I am of opinion that the fact of the pilot being chosen by the owners does not alter the law as to the captain's responsibility. Suppose the owners should contract, not only with the pilots, but with all the hands on board, through the agency of some other person besides the captain, as they probably do, would the captain therefore become entirely irresponsible? and must any one whose vessel has been run down, when a totally irresponsible person was at the wheel, bring his suit against a common sailor? The owners of a vessel may not be known; they may be residents of a foreign country. It would be adding insult to injury to say to a man, whose property had been destroyed, that he has his remedy against a common sailor, or the owners, who perhaps live in Europe. My opinion is, that the master of a steamboat is liable like the master of a merchant

144. By the general maritime law, every contract of the master, within the scope of his authority, binds the vessel, and as incident thereto, the freight, and gives the creditor a lien upon both for his security.[1] The ship is bound to the merchandise, and the merchandise to the ship. The shipper of goods, therefore, has a lien on the vessel, for any damage they may sustain from the fault or neglect of the master, or the insufficiency of the vessel. This lien may be enforced in the Admiralty by process *in rem*.[2] The lien of the merchant for his damages, attaches from the moment that the misfortune happens, and his claim upon the ship is preferred to the right of the general creditors of the owners. But like all other maritime liens, it may be lost by unseasonable delay in enforcing it. Obviously, however, it is not defeated by a *bona fide* sale, before he has had an opportunity to enforce it, and still more obviously

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ship; and that the circumstance of the pilot's being appointed by the owners does not discharge that liability, so far as third persons are concerned." See, also, Porter v. Curry, 7 Louis. R. 233; Patton v. Magrath, 1 Rice's R. 162. To make a person liable, who, otherwise, upon strict legal principles, would not be liable, because inconvenience might arise to third persons, if responsibility were not attached to him, is neither philosophical nor just. The general liability of the master, for the diligence and care of all persons under his command, within the scope of their employment, is universally recognised. If the owner has appointed incompetent persons to serve under him, he may, for that reason, decline the command—refuse to take it upon him. But if he does assume it, he assumes all the responsibility attached to it.

[1] The Paragon, Ware's R. 332.

[2] The Rebecca, Ware's R. 188; The Phebe, Id. p. 263; The Brig Casco, 4 Law Rep. 471; S. C. Davies, R. 184; The Schooner Volunteer, 1 Sum. R. 551.

when the purchaser has knowledge of the claim. By the civil and common law, the owner is responsible for all the obligations of the master to their full amount, whether arising *ex contractu* or *ex delicto*. But the general maritime law of Europe limits the liability of the owner in cases arising *ex delicto*, to the value of the vessel and freight, and by abandoning them he is discharged.[1]

145. This limitation of the responsibility of owners, however, has never been adopted in this country. It must be understood that it is not every wrongful act of the master that will bind the owner, or will operate an hypothecation of the ship. It is those acts only which fall within the legitimate range of his authority that produce this effect. While acting within these limits he binds the owners, because he is their authorized agent; and he binds the ship directly, because the policy of the maritime law has given to the shipper this additional security.[2]

146. Hence it is, that a shipper has a lien on the vessel for the execution of a contract by a bill of lading, entered into by the master, which may be enforced by process *in rem* in the Admiralty. And it is immaterial in this respect, whether the vessel is in the employment of the owner, or let by a charter-party or parol agreement, on the condition that the hirer shall have the whole control of her. By the maritime law, the master's authority to bind the

[1] The Rebecca, Ware's R. 188. The Statute Law of Maine has affixed the same limits to the owner's liability. Vide Laws of Maine, vol. 1, ch. 14, s. 8.

[2] The Rebecca, *supra*.

vessel is the same, whether he is appointed by the owners, or the ship is let to him by a charter-party. Whoever deals with the master, in all cases where he is acting within the scope of his authority as master, by the policy of the law, and upon a principle of common justice, is entitled to look to the ship as his security. And that security is not merely collateral or accessory to that of the owner, but it is the primary security.[1]

147. When the master contracts without any implied authority of the owners, arising out of the usual course of employment of the ship, they are not bound. Hence, if a ship is not put up to freight, but is employed by the owner on his own account, and the master receives goods of another person as part of his privilege, taking to himself the freight and commissions, the owner of the ship is not liable, in case of embezzlement, or for the conduct of the master in relation to such goods.[2] Nor is the owner

[1] The Druid, 6 Jurist, 441; S. C. 1 W. Rob. R. 301; The Waldo, Davies R. 161; The Phebe, Ware's R. 263.

[2] King v. Lennox, 19 John. R. 235. This was an action of assumpsit, brought against the defendant, as owner of the ship called the *Ram-Duloll-Day*, to recover the value of certain goods shipped on board of that vessel, on account of the plaintiffs, and consigned to them, on her voyage from Calcutta to New York, in the year 1817. The cause was tried before Mr. Chief Justice Spencer, at the New York Sittings, in April, 1820. A verdict was taken for the plaintiffs for 1494 dollars and 75 cents, subject to the opinion of the Court on a case made. It appeared that the master of the vessel, on the outward voyage from New York to Calcutta, received from the plaintiffs a quantity of cheese and verdigris, which was shipped as part of the master's privilege, allowed

liable for goods clandestinely taken on board by the master, he being present and having the management of the voyage himself, or being accidentally absent leaves an agent to whom he confides that business, intrusting nothing to the master but the care of sailing and directing the ship herself. If, however, the ship-owner under such circumstances assents to and adopts the act of the master, he will be held accountable.[1] The principle is, that when the owner takes upon himself the general manage-

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to him, as is usual by owners of vessels, and which were sold in C., two-thirds for account of the plaintiffs, and one-third for account of the master; and the proceeds, deducting the homeward freight and commission which were received by the master, were invested in the goods of the country, packed in a trunk, laden on board of the R., and consigned to the plaintiffs, at New York. No part of the shipment, outward or homeward, or the freight or commissions, were entered in the ship's accounts; but the same were considered as part of the master's privilege. The ship was not a general ship, but was wholly laden on account of the owner, except the usual privileges allowed the supercargo, master, and other officers. The trunk containing the goods in question was stowed in the cabin of the ship, under the master's berth, where he usually stows some part of his privilege. The master died on the homeward voyage. On the arrival of the ship at New York, the trunk consigned to the plaintiffs was opened at the custom-house, by persons appointed by the collector of the customs; when two shawls, all the pearls, and eight pieces of *choppa romalls*, mentioned in the invoice, to recover the value of which this suit was brought, were missing. It was held, that the owners were not bound—the ship being freighted wholly by them, and the master having no authority from them to receive goods on freight. See, also, Walter v. Brewer, 11 Mass. R. 99; Ward v. Green, 6 Cowen, 173; Peters v. Ballistier, 3 Pick. 495.

[1] Walter v. Brewer, 11 Mass. R. 99; Reynolds v. Toppan, 19 Mass. R. 370.

ment of the concerns of the vessel, he thereby limits *pro tanto* the authority of the master, and, therefore, when he makes a contract respecting the employment of the ship, the master cannot make another to annul or supersede it.[1]

148. It should be here observed, that usage has given to the masters of vessels certain privileges of transportation and traffic. These privileges may be abandoned by contract. Hence, where a master and supercargo was to receive a certain sum per month as wages, and a commission of five per cent., and also one-tenth of all the profits, and it was agreed that these were to be in full of all services and privileges, the master and supercargo is precluded by his contract from engaging in traffic upon his own account and for his own benefit.[2]

149. If the shipper consigns his goods to the master for sale and returns, in proceeding to dispose of them he does not act under any authority derived from his appointment as master, but in an entirely new character, that of supercargo or factor. And his duties and liabilities under these two characters are as distinct and independent as they would be if the trusts were confided to different persons. In all that relates to the transportation of the goods and navigation of the ship, he acts as master; and all that he does in relation to the disposition of the merchandise, is referred to his character as factor.

[1] Ward v. Green, 6 Cowen, 173; Peters v. Ballistier, 3 Pick. 495; Burgen v. Sharpe, 2 Camp. R. 529.

[2] Mathewson v. Clark, 6 How. (U. S.) R. 122.

In these characters he is the agent of different principals; in the first he is the agent of the ship-owners, and his acts are imputable to them; in the second he is a stranger to them, and they are no more responsible for his acts than they would be for those of a third person to whom the shipper should consign his goods. In the transaction of that business he is the agent of the shipper.[1] When, however, it is the usage of the particular trade for the master to act as consignee, and bring back the proceeds of the goods shipped, for all which a proper compensation is allowed in the nature of freight, the owners are liable for the proceedings of the master in conducting such sales, and for the proceeds received by him.[2]

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[1] The Waldo, Davies' R. 161.

[2] Emery v. Hersey, 4 Greenl. R. 407; Kemp v. Coughty, 11 John. R. 107; Kendrick v. Delafield, 2 Caines R. 67; Earl v. Rowcroft, 8 East. R. 126, 140; Cooke v. Com. Ins. Co. 11 John. R. 40; Crousillat v. Ball, 4 Dall. 294. The case of Kemp v. Coughty, *supra*, arose in the trade between New York and Albany. It was proved to be the usual course of the trade, to send goods with orders to the master to sell either for cash or credit, and for him to return the proceeds to the shipper. No commissions were allowed the master for this service, nor to the owners, beyond what was involved in the freight. It was decided when the master had sold the goods, and failed to pay over the proceeds to the shipper, that the owners of the vessel were liable. The liability, in that case, was not founded on the general maritime law, but arose out of the particular custom. Under that custom the ship-owners undertook to act in the character of factors, as well as carriers; and intrusting the whole business to the master as their servant, they would be answerable for him *personally* in one character or the other. It is another question, whether for his defaults in the character of factor the shippers would have a remedy against the vessel *in rem*. That is an open question. But it would seem that there is no substantial ground upon which to hold

150. It has been supposed, that as the master could bind the owners for all necessary repairs and supplies furnished during the voyage, they became *ipso facto*, acceptors of his drafts drawn in payment of them. But such is not the case. There is no such legal relation between the master of a vessel and his owners, that they become, by force of such relation, acceptors of a bill of exchange drawn by him in a foreign port for supplies for the vessel. There is no doubt of the master's power to bind his owners for repairs and supplies in a foreign port. His agency as master is sufficient to bind them for the payment; and to enable him also to obtain the credit, he may pledge the vessel by bottomry contract, and hypothecate the freight and cargo belonging to the owners; but he cannot draw bills of exchange, and bind them in law as acceptors, from the fact that the bills are drawn for supplies. The law imposes no such liability upon them, and places no such temptation in the hands of the master to exceed his authority.[1]

151. Owners are answerable for the torts of the master done within the scope of his employment; and this responsibility arises from a general principle of the maritime law, and not by virtue of any

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the vessel liable for acts of the master, in no way connected with his office of master. The case of Emery v. Hersey, *supra*, turned upon the same principles as were involved in Kemp v. Coughty, and was decided upon the ground of a similar custom prevailing in the trade between Saco and Newburyport. Vide, also, Emerigon, *Contrats a la Grosse*, ch. 4, s. 11, and *Des Assurances*, ch. 12, s. 3.

[1] Bowen v. Stoddard, 10 Met. R. 375.

special contract.[1] The Admiralty has jurisdiction in cases of maritime torts, *in personam*, as well as *in rem*, and may issue the process of attachment to compel appearance, both in cases of maritime torts and contracts.[2] In cases of collision occurring on the high seas, from want of care and skill on the part of the injuring ship, the familiar remedy in the Admiralty is called a cause of collision. It lies against the owner and also against the ship itself.

152. In a very recent case of collision in the English Admiralty, it was held, that when a vessel at sea causes damage, an inchoate lien emerges; and when the amount of the damage is judicially ascertained by a proceeding *in rem*, the lien relates back to the period when it first attached, and takes priority, to the extent of the then value of the vessel, of all other liens, and travels with the vessel wherever she goes, or into whose hands soever she passes; but this lien arising out of damage is not indelible, but may be lost by negligence or delay, where the rights of third parties are compromised. A proceeding *in rem* in the Admiralty Court for wages, salvage, collision, or bottomry, goes against the ship in the first instance. A maritime lien and a proceeding *in rem* are correlative: wherever a proceeding *in rem* is competent a lien exists, and *vice versa*.[3]

153. This is the first case, we believe, where an

[1] Dean v. Angus, Bee's Ad. R. 369.

[2] Munro v. Almeida, 10 Wheat. R. 473; The Invincible, 2 Gallis. R. 41.

[3] The Bold Buccleugh, 3 W. Rob. Ad. 220; S. C. American Law Register, vol. i. p. 51.

English or an American Court of Admiralty has directly held, that damage caused by collision was a lien on the colliding vessel. The vessel has been held liable, as a means of security for the damage, and not upon the ground that there was any technical lien. The practical result, however, has been the same, and the vessel, in either case, is held responsible, even in the hands of a *bona fide* purchaser.[1]

154. But while the law holds, and justly holds, the owners responsible for the torts of the master, done within the scope of his employment, it discharges them from all liability, when he quits sight of the object for which he is employed, and commits a wanton trespass. He is then not obeying their orders, either express or implied, but following the suggestions of his own malice. But here the law makes a distinction, and holds the owners accountable in cases of general malice, as when a steamer goes through a very crowded roadstead in a dark night, occasioning a collision, and destroying a ship and crew, but exonerates them in a case of particular malice. The law implies malice in an act of the former character, and makes the owners answerable for the recklessness of their servant while pursuing their business—he at the same time being respon-

[1] The Thames, 5 Rob. 345; The Dundee, 1 Hagg. 109; The Woodrop Sims, 2 Dod. 83, 1 Dod. 467; The Stockton, Crabbe's R. 580. What is stated in the text does not relate to the question, whether the vessel is liable *in rem*, in a cause of collision, when she is in charge of a licensed pilot at the time of the collision. See post, pt. 2d, tit. Pilots.

sible both civilly and criminally. In the latter case the owners are not accountable, because the master, from the direct instigation of malice, goes beyond the line of his employment, and wilfully commits a trespass, as when intentionally he runs another vessel down.[1]

155. The law, upon similar grounds, makes the owners of privateers liable for any torts committed by the master and crew in making captures, &c., in the course of their cruise. Unoffending neutrals are not to be subjected to acts of trespass and wrong committed by privateers, and then turned over for their remedy to the actual wrong-doers, who may be wholly irresponsible, but the law gives them a two-fold remedy against the owners or their servants.

156. When the suit is against the original wrong-doers, Courts of law, if the circumstances of the case demand it, will visit upon them, in the shape of exemplary damages, the punishment which belongs to their lawless misconduct. But when the suit is against the owners of the privateers, different considerations prevail. The law, from motives of policy, has devolved upon them a responsibility for the conduct of the officers and crew employed by them, while they, from the nature of the service,

[1] The Druid, 6 Jurist, 144; Wright v. Wilcox, 19 Wend. 343; The Richmond Turnpike Company v. Vanderbilt, 1 Hill's R. 343; M'Manus v. Crickett, 1 East, 106; Bowcher v. Widstrom, 1 Taunt. 568; Lyons v. Martin, 3 Nev. & Perry, 509; Dusar v. Murgatroyd, 1 Wash. C. C. R. 13; Stone v. Ketland, Id. 142; see The State Rights, Crabbe's R. 48.

can scarcely ever be able to secure to themselves an adequate indemnity in cases of loss. Hence, when they are innocent of the demerit of the transaction, having neither directed it nor countenanced it, nor participated in it in the slightest degree, they are only bound to repair all the real injuries and personal wrongs sustained by the injured party. They are not bound to the extent of vindictive damages. Nor are they bound for any deterioration of the cargo, not attributable to the improper conduct of the officers and crew of the privateer. Nor for the probable or possible benefits of a voyage. The prime cost or value of the property lost, at the time of the loss, and in case of injury, the diminution in value, by reason of the injury, with interest upon such valuation, affords the true measure for assessing damages. Nor is the owner of the privateer answerable for money paid to the master and crew, in the shape of ransom, for the release of the property unjustly captured. The utmost extent of loss to which the owner is subjected in such a case, is the payment of the costs and expenses of bringing the property to adjudication; and for such costs and expenses, so far as they were incurred and paid in any particular case, the party paying them is entitled to receive a recompense.[1]

157. The liability of the owners, however, is only in those cases when the wrongful capture was made

[1] The Amiable Nancy, 3 Wheat. R. 546; La Amistad de Rues, 5 Id. 384; The Mary, 1 Mason. R. 365; The Owners of Three Brigs, 1 Dall. R. 95; Del. Col. v. Arnold, 3 Dall. R. 333; St. Jean Baptista, 5 Rob. R. 33; Karasan, 5 Rob. 291; Nostra Signora de los Dolores, 1 Dod. 290; Die Fire Damer, 5 Rob. 357.

as prize. They are liable in such cases, because the officers and crew are authorized to make captures as prize; they are in the direct execution of the business in which they are employed, when they proceed to do so. But the owners are exonerated from liability when the acts of the privateer are piratical, because she has no authority to commit acts of piracy. When she commits such acts, she exceeds her authority, violates her orders, acts in a business different from that for which she was employed, and is guilty of crime. There is no principle of law or justice upon which, in such a case, the owners can be held liable.[1] When liability is fixed

[1] The Privateer Revenge, 3 Wash. C. C. R. 262; Bynk. 128, 129, 133, notes. "To a certain extent," said Washington, J., in the case cited, *supra*, "a privateer is a public vessel, and forms a part of the national armed force. . . . . In other respects, she is to be considered as private property; equipped and fitted for war at the sole expense of the owner; navigated by officers and crew chosen and appointed by himself, and paid by him; and subject to such lawful orders and instructions as he may think proper to give. In consideration of the expense to which the owner thus subjects himself in co-operating with the public armed force in hostile operations against the enemy, the nation cedes to him, and those he may employ to conduct the privateer, the exclusive benefit of all the spoils which his vessel may lawfully capture as prize; to be distributed between himself and the officers and crew of his vessel, according to any written agreement which shall have been made between them; and in case no such agreement should have been made, then according to a certain ratio prescribed by law. It results from all this that the employment of a privateer, and the trust confided to her officers and crew, is to subdue and seize the vessels and effects of the enemy found at sea, as well as all other vessels and effects, to whomsoever belonging, which may be liable thereto, according to the law of nations; and to bring all such property into a port of the capturing power for adjudication

upon the owners, one of the part-owners cannot exempt himself from damages by making a compensation for the tort, and procuring a release of himself from the injured party.[1] The real owner, although his name does not appear in the bill of sale or ship's papers, will be answerable for damages, and this liability attaches to his representative.[2]

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as prize of war." For captures *improperly or wrongfully* made, the owners are liable, but not for *unauthorized* captures, that is, captures made in a business different from that for which he was employed. See Judge Hopkinson's comments upon this case in 2 Gilpin's R. 48.

[1] The Karsan, 5 Rob. 291.

[2] Nostra Signora de los Dolores, 1 Dod. R. 290. For other cases under this head, see Martens v. Ballard, Bee's Adm. R. 51; Slowcum v. Mayberry, 2 Wheat. R. 1; The Apollon, 9 Wheat. 362; Munro v. Almeida, 10 Ibid. 473; The Dundee, 1 Hagg. 109; Burke v. Trevitt, 1 Mason's R. 96; The Enchantress, 1 Hagg. Ad. R. 395; Chamberlain v. Chandler, 3 Mason, 242.

# CHAPTER VII.

## OF THE MASTER'S AUTHORITY WITH RESPECT TO THE VESSEL.

I. Of the Master's Relation to the Owners.
II. Of his Duties in Time of War.

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### I. OF THE MASTER'S RELATION TO THE OWNERS.

158. The master is the general agent of the owner or employer of the ship, as to procuring repairs and supplies for the ship, in a foreign port, in the absence of the owner or employer. This power is not unlimited; but is restricted to such repairs and supplies as are in a just sense necessary for the ship under the actual circumstances of the voyage. The interpretation put upon the phrase *necessary* repairs, is, that they must be such as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety of the ship, or the accomplishment of the voyage.[1]

159. A person who lends money to be employed in the repairs of a vessel, or to furnish her with sup-

[1] The Ship Fortitude, 3 Sumn. R. 228, 236; The Aurora, 1 Wheat. R. 102; 3 Kent's Com. 163; Molloy, B. 2, c. 1, sec. 10.

plies, has the same privilege against the vessel and freight that material-men have. To justify the master in borrowing, it is not absolutely essential that the occasion should arise abroad or in a foreign port. He may borrow in a port of the State in which the owners reside, if the case is one of pressing necessity, such that the master and owner cannot communicate without great prejudice and delay.[1]

160. The master himself, unless there be some special agreement, is in every case personally responsible upon all the contracts which he makes in reference to the repairs, supplies, and navigation of the ship. But if there is a special promise by the owners, the master is discharged from any obligation, and on the other hand, if there is a special promise by the master, the owners are not liable. In the absence of any special contract, both the master and owners are bound for the repairs and supplies he obtains for the ship. The master, because the credit is given to him; the owner, because the contract is on his account. If the repairs and supplies are ordered in the home port, they will generally be presumed to be chargeable to the master as well as to the owner; the same as if obtained in a foreign port. But if it is shown that the owner, or the ship's husband, managed the vessel, and that the party contracting with the master was aware of this, then the presumption of the master's authority, as agent of

[1] Hooper v. Whitney, 3 Kent's Com. 172, note; Arthur v. Burton, 6 M. & W. 188; Johns v. Simons, 2 Adol. & Ellis, N. S. 424; Stonehouse v. Gent, Id. 431; Davis v. Child, Davies' R. 71.

the owners, is rebutted, and they are not bound. Of course, when the repairs or supplies are ordered by the owners, the master is never liable. The owners contract for their ship, the credit is given to them only, and there is no ground upon which to charge the master.[1]

161. When the repairs and supplies are reasonably fit and proper, the master, if he has not suitable funds, or cannot obtain money on the personal credit of the owner, may take it upon bottomry. The lender on bottomry is bound to exercise reasonable diligence, in order to ascertain whether such repairs and supplies are necessary and proper. He is not bound, however, to show that there was a positive necessity. It is sufficient, if there is an apparent necessity, so far as the lender is able upon due inquiry and due diligence to ascertain the facts. The lender upon bottomry will be protected in such a case of apparent necessity for his advances, even though, upon a closer examination, and a more thorough investigation of the facts at a subsequent period, it should be doubtful whether the supplies and repairs were really necessary. When there is an apparent necessity for repairs, the lender on bottomry is under no obligation to inquire, as to the best mode of making the repairs, or whether they are made in the

[1] See the authorities collected in Flanders' Maritime Law, 174, 175. It must be understood with reference to the doctrines of the text, that the master has no power or authority over the voyages or concerns of the ship, or the interests of the owners beyond what the law of his own country justifies and sanctions. Pope v. Nickerson, 3 Story's R. 465; *contra* Malpica v. M'Koun, Miller's Louis. R. 240; Arago v. Carrol, Ibid. 528.

most judicious manner, or to ascertain the cause of the injury. As, when, for example, an acknowledged leak exists, how it is caused. It is sufficient, if he acts with good faith; and does not wilfully co-operate in any unnecessary expenditure.[1]

162. Although the owner may have given particular instructions to the master, which greatly curtail his general authority, he will nevertheless be answerable for his contracts falling within the general power belonging to his situation and character, notwithstanding such contracts are in violation of the particular authority given to him. But the master is responsible to the owner for the injury sustained by him, in consequence of the violation of his instructions.[2] A man who undertakes to navigate a ship, is pledged to his owners, and he and they to all the world who may be affected, for his skill, care, and attention. It is not sufficient for him to say that he exercised his best judgment, but he is bound to show that he possessed and exercised the judgment of a skilful and careful commander.[3]

163. The master and owners are responsible for every injury that might have been prevented by

[1] The Ship Fortitude, 3 Sum. R. 228. Mr. Justice Story, in this elaborate and learned opinion, has fully examined the whole subject, and left nothing to be added to the questions he has discussed. See Gibbs v. The Texas, Crabbe's R. 236; Patton v. The Randolph, Gilpin's R. 457.

[2] Abbott on Ship. p. 218; Grant v. Norway, 2 Eng. Law and Eq. R. 337.

[3] Stone v. Ketland, 1 Wash. C. C. R. 142; ante, chap. 1, and chap. 6.

human foresight or care. They are liable for goods stolen or embezzled on board the ship by the crew or any other persons, although no negligence may be imputable to them. The rigor of the law in this respect arises from reasons of public policy, and to prevent the combinations that might be made with thieves and robbers.[1] The owner is exempt from liability for acts of the master beyond the scope of his general authority; for no one is answerable for the unauthorized acts and doings of another. Hence if the general employment of a vessel is in the coasting trade, and the master, without any authority, takes goods or freight for a foreign voyage, the owner is not answerable to the shippers. In such a case, notwithstanding the master was appointed by the owner, yet the latter could defend himself on the ground that he never had employed, or authorized the master to employ, his ship in such a voyage. Nor is the owner liable, if the master commits acts of piracy. Such acts are imputable to those only who perform them, and cannot upon any principle of common, maritime, or national law, be visited upon the owner.[2]

164. The owners may dismiss the master at their pleasure. It is no part of the contract that a master once engaged shall be master for the voyage at all events. If it were otherwise, it might prove extremely injurious to owners, on account of the very extensive powers the master has over their property. The owners, however, are answerable for all his acts

[1] Schieffelin v. Harvey, 6 John R. 170.

[2] Dias v. Privateer Revenge, 3 Wash. C. C. R. 262.

done within the scope of his authority anterior to his dismissal. And the master would be entitled to compensation, if he incurred any loss, or sustained any damage from his dismissal, unless it was for sufficient cause. His proper remedy in such a case would be an action at law. Upon a general retainer, for no particular voyage, the master may be dismissed at any time without cause assigned; because the nature of his employment, upon that condition, is a mere agency, to be revoked at any time by the principal.[1]

165. The Admiralty will dispossess the master if the owner, or a majority of the owners, when there are several, declare their disinclination to continue him in possession. But if the master should be a part-owner, the Court would require some special reason, before proceeding to dispossess a person who is a proprietor in the vessel.[2] Mr. Curtis, although he admits the question to be an open one, and the opinions of jurists to be divided upon it, concludes from an examination of the ancient maritime codes, that by the maritime law the owners have a right to remove the master, who is a part-owner, at their own pleasure, paying him for his share of the vessel; but if he is removed without good cause, after an engagement for a particular voyage, he thinks they are bound to pay him damages for the loss of the employment as master, and for any losses or liabilities he may have incurred by reason of his appointment.[3]

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[1] Montgomery v. Wharton, 1 Peters' Adm. R. 397; S. C. 1 Dall. R. 49; Curtis's Merchant Seamen, 166.

[2] The New Draper, 4 Rob. Ad. 237.

[3] Rights and Duties of Merchant Seamen, p. 164. See also The

## II. OF THE MASTER'S DUTIES IN TIME OF WAR.

166. It is a principle universally applied in a Court of Prize, that the act of the master of the vessel binds the owner in respect to the conduct of the ship, as much as if such act was committed by the owner himself. The law invests him with certain powers; and if he abuses his trust, it is a matter to be settled between him and the person who constituted him master; but his act of violation is, as to the general consequences, to be considered as the act of the owners.[1]

167. If the master goes to a blockaded port against the orders or without the knowledge of the owner, he is bound nevertheless. If the owner trusts his property to the care of such a person, he must be held answerable for his integrity, and in some degree for his prudence. If the master, after being warned of the existence of a blockade, approaches the blockaded port, or acts in such a manner as cannot, for the safety of other cases, be admitted to proceed from justifiable ignorance, his principal must take the consequences of his imprudence.[2]

168. Ordinarily, the acts of the master do not bind the owner of the cargo, he not being the representative of the cargo, nor *de jure* the agent of its owner.

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Johan and Siegmund, Edw. Ad. R. 242; The Sea Renter, 1 Dod. Ad. R. 22. The master will not be dispossessed where there is a mere equality of interest. 1 Hagg. Adm. R. 346, note.

[1] The Vrouw Judith, 1 Rob. Ad. R. 150.

[2] The Adonis, 5 Rob. Ad. R. 228.

If, however, the owner of the cargo is also owner of the ship, or conusant of the intended violation of belligerent rights, or if the master is directly the agent of the owner of the cargo, in these cases the acts of the master bind the owner of the cargo, as well as the owner of the ship. When the master deviates into a blockaded port, and the excuses which he sets up for so doing are pronounced by a Court of Prize either not real or not sufficient, a presumption necessarily arises that it was for the delivery of the cargo that such a fraud had been attempted. Such a presumption necessarily arises, because there is scarcely any other adequate motive which can be supposed to induce a master to hazard the interests of his vessel; the motives which he assigns being demonstrated to be false. There is a presumption also in such cases, that the act of the master was done with the knowledge, and at the instigation, of the owner of the cargo; because, although it is not an impossible thing that masters may be guilty of barratry, it is not a natural conduct, nor gratuitously to be supposed. Lord Stowell held, that the presumption in such cases was absolutely conclusive; that the owner of the cargo was absolutely bound by it, and could not be admitted to rebut the presumption by any contrary averment whatever. And this on account of the fraudulent abuse to which such a liberty must inevitably lead, since it would be perfectly easy, at any time, to set up the pretence, and equally impossible, on the other side, to detect it.[1]

[1] The Adonis, 5 Rob. Ad. R. 228; The Mina, 3 Rob. 169; The Rosalie & Betty, 2 Rob. 343, 351; The Alexander, 4 Rob. 93; The Elsebe, 5 Rob. Ad. R. 173; The Marianna, Flora, 11 Wheat. 57.

169. There are other cases where the act of the master will bind the owner of the cargo, as well as the owner of the ship. One of the most prominent is, a resistance of the right of search. This is a belligerent right of long standing, and of manifest necessity. If a neutral furnishes to one belligerent articles contraband of war, he gives aid to that belligerent, and thus directly interposes in the war. A neutral government, encouraging a contraband trade with a belligerent, would undoubtedly be deemed to have taken such a part in the war as to become a party to it. But when the citizens of a neutral country, without any implication of their government in their unlawful act, engage in a contraband trade with one belligerent, the only consequence resulting from such conduct is, that the contraband goods are liable to seizure and confiscation. To ascertain whether neutral vessels have on board contraband goods, the right of visitation and search is essential, and hence is generally acknowledged. A resistance therefore to this admitted right is *per se* illegal. It is an attempt fraudulently to withdraw the cargo from the rights of war, and the cargo therefore as well as the vessel is condemnable *de jure*.[1]

170. A neutral must not contribute, either directly or indirectly, to the force of an enemy. Sailing under convoy is not an act of itself that will subject a neutral ship and cargo to confiscation, but resistance of the convoy ship is the resistance of the whole convoy; and the resistance of the ship affects

[1] The Catharina Elizabeth, 5 Rob. Ad. R. 206; The Elsebe, 5 Rob. 173.

the cargo.[1] And in all cases where the master is the agent or consignee of the cargo, his act will bind the owner exactly as that of any other agent or consignee. It may be laid down as a proposition, sanctioned by the law of nations, that any illegal act of the master of a neutral ship, having for its object the benefit of the cargo, will be deemed to be authorized by the owner of the cargo, and will subject both ship and cargo to condemnation.[2]

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[1] The Maria, 1 Rob. 340; The Elsebe, *supra*.

[2] See Appendix to 2 Wheat. R. 38; Miston v. Lord, Blatchford's R. 357.

## CHAPTER VIII.

### OF THE MASTER'S DUTY UPON AN INTERRUPTION OF THE VOYAGE.

171. The master of a merchant vessel becomes of necessity an authorized agent for the owners, freighters, insurers, and all parties concerned in the voyage, when its progress is interrupted either by a capture as prize, or by other detentions and casualties; and whatever he undertakes, and whatever expenses he may incur fairly directed to the benefit of all concerned, become a charge upon them respectively, in the same manner as if incurred at their special request.[1]

172. If the ship is driven out of her course by stress of weather, the charge of the cargo devolves upon the master, who is bound to take proper care of it. If the goods are damaged, or of a perishable nature, he has power to sell them. If they are so much damaged that to proceed with the voyage will endanger the safety of the ship or render the goods worthless, it is the duty of the master to land and sell them at the port of necessity, in the absence of instructions from the shipper, even though they may be in a condition to be carried *in specie* to the port

[1] Douglass v. Moody, 9 Mass. 548.

of destination and there landed. If a part of the cargo is in good condition and not perishable, the master has no right to sell it without the order of the owners, to whom he is bound to give immediate information.[1]

173. If the ship is disabled from performing the voyage by the perils of the sea, the master must obtain another vessel, if one can be procured in the same or a contiguous port, and proceed with the cargo to the port of destination. This rule, however, is not absolutely inflexible. The master is *in loco procuratoris*, both to the ship and cargo. He is bound to exercise a sound discretion in the circumstances in which he is placed. And if it appears that it would be better not to tranship, owing to reasonable cause, the master is restrained from transhipment.[2] Circumstances make it necessary to re-

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[1] Smith v. Martin, 6 Binn. 261; Miston v. Lord, Blatchford's R. 357; Jordan v. Warren, 1 Story's R. 342.

[2] Luke v. Lyde, 2 Burr. 889; Schiefflin v. New York Exch. Ins. Co. 9 Johns. R. 21; The Gratitudine, 3 Rob. Adm. R. 240; Searle v. Scovill, 4 John Ch. R. 218, 3 Kent, 168. "It is clear from all the authorities," says Mr. Curtis, in his work on Merchant Seamen, (both) "ancient and modern, that if the ship cannot be repaired at all, or not without very great loss of time, the master is at liberty to tranship, and so to earn the whole freight. In such case, the freighter is bound to pay the extra freight for the renewed voyage, which the master pays for the hire of the vessel which he procures. If, however, the vessel can be repaired in a reasonable time, and the cargo is not perishable, the master is not bound to tranship, but he may detain the cargo until the repairs are completed. If the cargo is of a perishable nature, and there is not time or opportunity to consult the proprietor, he may sell a part of it, or hypothecate the whole, if necessary, to effect

pose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched.[1]

174. If, however, the ship is capable of repair, and this can be done in a reasonable time, it is the duty of the master to make the repair, provided he can obtain the means. If he cannot obtain them upon the security of the ship, he may hypothecate the whole cargo or sell a part, and apply the proceeds to the prosecution of the voyage. "The books all admit that he may sell a part; some ancient regulations have attempted to define what part, others have not. The general law does not fix any aliquot part, and indeed it is not consistent with good sense to impose a restraint, or to fix any limitation to measure a state of things which is to arise only from necessity. It must, generally speaking, be adequate to the occasion. One limitation, however, the policy of the law necessarily prescribes: that the power of selling cannot extend to the *whole*, because it can never be for the benefit of the cargo, that the whole should be sold to repair a ship which is to proceed empty to the place of her destination. There will in that case be no safe custody and transmission, and therefore the power of selling, for the repairs of the ship, must be limited to the sale of *a part*, though it may not be possible to assign the exact part, except

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the repairs of the ship, and to enable him to carry the residue forward, or he may tranship it, according as in the best exercise of his judgment would be for the interest of the whole cargo."

[1] Shipton v. Thornton, 9 Adol. & Ellis, 314; see, also, 1 Perry & Dav. 216.

where positive regulations have fixed it."[1] The reader will find in another part of this volume this subject more fully considered, and the rights and duties of the master in the premises more fully explained.[2]

175. If a neutral ship is carried by a belligerent party into a port of the captors, for adjudication, the mariners are bound to remain by the ship until a condemnation or all hope of recovery is gone, and a voluntary abandonment of their duty in this respect amounts to desertion and forfeiture of wages.[3] The obligation of the master to remain by the ship, in such circumstances, is far more strong in point of right and duty than that of the mariners. He is intrusted with the authority and obligation to interpose a claim for the property before the proper tribunal, and to endeavor, by all the means in his power, to make a just and successful defence. To abandon the ship to her fate, without asserting any claim, would be a criminal neglect of duty, and would subject him to heavy damages for a wanton sacrifice of the property. As, therefore, the law compels him to remain by the ship, and attaches him in some sort to her fate, he is entitled to receive compensation for his services, and this compensation is a charge to be borne in the first instance by the owner of the ship, and ultimately as a general average by all the parties in interest. If the master should deem an appeal to be expedient, he is bound to enter it, and may, in his discretion, remain until copies of the papers are

[1] The Gratitudine, *supra*. [2] Post, chap. 10.
[3] The Brig Elizabeth, 1 Peters' Ad. R. 128.

obtained, and other means of rendering the appeal effectual are concluded.[1]

176. The mariners, however, are not bound to remain with or near the ship after an unfavorable adjudication in the lower Court of Admiralty of the captors, though an appeal may be entered, and the vessel remain in custody and unsold. But they are bound, as already stated, to wait, if required, for this adjudication; not only to take care of the ship and her cargo, if permitted to do so, but to afford their testimony in the cause, when required to be used on the trial, in the first instance, and transmitted among the *apostella*, in case of appeal.[2] If the vessel is carried in for adjudication on account of the cargo, the master must contribute his exertions to rescue the property from condemnation, by interposing a claim, and exhibiting in support of it the documents with which he is furnished for its protection. If he negligently performs this duty, and the proprietor of the goods sustains damage in consequence, he is responsible for it.[3] The master is bound to save for the owners the ship and cargo by all fair means within his power, but he is not bound to employ fraud in order to effect the object.[4]

177. On the contrary he is bound to the exercise of good faith, and if there is an absence of it, he may subject the owners to costs and damages. If there

[1] Willard v. Dorr, 3 Mason's R. 167.

[2] The Brig Elizabeth, *supra*.

[3] Cheviott v. Brooks, 1 John. R. 364.

[4] Hannay v. Eve, 3 Cranch's R. 242.

is a suppression of the ship's papers, a fraudulent cover of belligerent property, an illegal rescue, in all such cases the default of the master subjects vessel and cargo either to condemnation or costs and damages.[1] Where the master is consignee of the cargo, his acts are to be referred, in respect to shippers, to the particular character in which the acts are done. Generally the master does not and cannot lay aside his character and responsibility as master, until the vessel performs her voyage, and arrives at the port of destination. The accidental circumstance of the character of consignee being added to that of master, cannot qualify or alter his acts as master; the two characters being wholly distinct.[2]

178. After the arrival of the cargo at the port of destination, the acts of the master are to be considered as done in his character of consignee. A new relation is interposed, and the master now acts as the agent of the consignor. And if in the sale of the cargo, and accounting for the proceeds, he acts fraudulently, the ship-owner is not responsible. It would be otherwise if the owner and not the master received the commissions upon the sale, or if it were the usage in the particular trade to consign goods to the master for sale, and the freight received by the owners covered the whole compensation paid for the carriage and sale of the goods.[3]

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[1] The Elsebe, 5 Rob. 173; The Dispatch, 3 Rob. 279; The Nereide, 9 Cranch, 388, 451.

[2] Kendrick v. Delafield, 2 Caine's R. 67; 8 East's R. 140; 4 Dall. R. 294; Cook v. Com. Ins. Co., 11 John. R. 40.

[3] Williams v. Nichols, 13 Wend. R. 58; Kemp v. Coughty, 11 John. R. 107.

179. For in these instances the master undertakes these additional duties, as the agent and for the benefit of his owners. He is not acting in a different capacity, distinct from his capacity as master, and receiving therefor from the shippers a distinct compensation. He is not therefore their agent. He acts for the owners, they receive the benefit of his services, and are responsible for his conduct.

## CHAPTER IX.

### OF THE CARRIAGE OF GOODS.

180. We are now to consider the duty and obligation of the master and owners with respect to the means of transporting the cargo. And in doing so, our progress will be but little impeded by contrary and conflicting decisions. The Courts, not only of our country but England, and we may add the jurists of Continental Europe, have concurred with singular unanimity, in holding the master and owners accountable for the custody and safe carriage of the cargo intrusted to them, and generally to the same extent and upon the same grounds.

181. Our law, however, holds a common carrier to a stricter liability than the civil, which exonerates him if the loss arose from robbery or irresistible force.[1] Originally, the doctrine of the common law was the same, and a common carrier was not charged in the case of robbery, unless he travelled by dangerous ways, or at unreasonable hours.[2] But to prevent the combinations that otherwise might be made with thieves and robbers, the present stern rule was

[1] Digest, tit. Nautæ, Caupones, &c., 4, 9, 3.
[2] Jones on Bailments, p. 103.

adopted, which holds common carriers liable even though they are overpowered by a superior force and the goods stolen.[1] Carriers by water, whether in foreign or inland navigation, are subject to the same strict rule, and nothing excuses them for the non-delivery of the cargo, but the act of God, or the public enemy, or the happening of an event expressly provided for in the charter-party or bill of lading.[2]

182. We shall consider in a subsequent chapter, the causes which will excuse common carriers. The subject immediately before us, is the duties of car-

[1] Forward v. Pittard, 1 T. R. 27; The Huntress, Davies' R. 82; Hyde v. Trent & Mersey Nav. Co., 5 T. R. 389; S. P. 1 Esp. 36; Gibbon v. Paynton, 4 Barr, 2298. There is a distinction between the case of a common carrier and a bailee. The latter is only obliged to keep the goods with as much caution as he would keep his own; but a common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without his fault; the reward making him answerable for their safe delivery. Id. The real reason of the rule, however, is one of public policy, as stated by Mansfield, C. J., in the case of Forward v. Pittard, *supra*, namely, to prevent combinations with thieves and robbers. A hoyman who undertakes to carry goods must deliver them safe at all events, and nothing excuses him but the act of God or the King's enemies. Dale v. Hall, 1 Wils. 281. And the principle of this latter case runs through all the decisions, and marks and limits the common law responsibility of a common carrier. By the civil law, a steamboat destroyed by fire does not make the owners liable to freighters, if they show the use of proper diligence. See Hunt v. Morris, 6 Martin's Louis. R. 676.

[2] Elliott v. Russell, 10 John. R. 1; Story on Bailments, s. 512–525; 3 Kent. 216; 2 Mars. on Ins. ch. 12, pp. 487, 492; Gilmore v. Carman, 1 Smedes & Mar. 279; M'Gregor v. Kilgore, 6 Ohio, 358; Kemp v. Coughty, 11 John. 107; M'Arthur v. Sears, 21 Wend. 193; Abbott on Shipp. 424.

riers by sea, with respect to the preparation of the voyage, and the safety of the goods. And first, a vessel must be provided, tight, staunch, and strong, with everything requisite for the voyage, with a master of due skill, and a sufficient crew. The owner is bound to see that the vessel is in a suitable condition to transport her cargo in safety. She must be in this condition, not only at the commencement of the voyage, but she must be kept so during its continuance, unless the perils of the sea, or unavoidable accident prevent. To this extent, the owner is an insurer of the goods. Hence, if they are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter, and upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he employs her.[1]

183. It must be observed, however, that there is a fundamental difference between the carrier's contract and the contract of insurance. By regarding them as standing upon common ground, and governed by common principles, a great and radical error is the result. For a breach of the warranty of seaworthiness in the contract of insurance, is not visited on the insured as a penalty, but operates to avoid the policy by the failure to perform it as a precedent condition.[2] But in the contract for the carriage of

[1] Silva v. Low, 1 John. Cas. 184; Putnam v. Wood, 3 Mass. 381; The Brig William Henry, 4 Lou. R. 223; Bell v. Read, 4 Binn. 127, 3 Kent. 205; Hart v. Allen, 2 Watts' R. 114; Reed v. Dick, Ibid. 479.

[2] Hart v. Allen, *supra*, overruling Bell v. Read, *supra*. Unseaworthiness at the commencement of the risk, is insufficient to bar

goods, the seaworthiness of the vessel is an implied condition of the contract, but not a precedent condition, and therefore the want of it does not throw upon the carrier the responsibility of an insurer for all losses that may subsequently occur, no matter from what causes they proceed. A carrier is answerable for the consequences of negligence, not for the abstract existence of it. Hence, if his vessel is not seaworthy, but the cargo is not injured from that cause, but from a peril of the sea, the carrier is exonerated. If his delinquency produces no mischief, he is not punishable for it. But we shall consider this subject more at large in a subsequent chapter.[1] The law implies a stipulation on the part of the carrier to keep the vessel in repair during the progress of the voyage. If she meets with an accident, the repair must be effected at the most convenient port. If he fails to do this, he is answerable

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a recovery for a loss which happened after an original defect had been removed. Weir v. Aberdeen, 2 Barn. & Ald. 320. And a breach of the warranty has not a retrospective operation so as to avoid the liability of the insurer for a previous loss. Annen v. Woodman, 3 Taunt. 299.

[1] Post. chap. 12. See also Ripley v. Scaife, 5 B. & C. 167; Garrigues v. Cox, 1 Binn. R. 592; Kimball v. Tucker, 10 Mass. 192; Ibid. 483; The Waldo, Davies' R. 160; The Paragon, Ware's R. 322. In the case of the Waldo, *supra*, the goods were laden on deck without the consent of the shipper, and without the sanction of custom. It was held, that being so laden, they were at the risk of the carrier, and if lost or damaged, he could not protect himself by showing that the loss or damage was occasioned by the dangers of the sea. He must proceed one step further, and show that the calamity by which the loss or damage occurred, would have been equally fatal, even if they had been properly secured under deck. See also The Paragon, Ware's R. 322.

for any loss that may ensue; for, as before observed, the vessel must not only be in a suitable condition to receive the cargo, but she must also be in a suitable condition to retain it, and transport it with safety to the port of destination. The same general principles that govern in policies of insurance, are equally applicable to charter-parties and contracts of affreightment.[1]

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[1] The authorities are the same as in the preceding note. See also, Lyon v. Mells, 5 East. R. 428; Whitall v. Brig M'Henry, 4 Louis. R. 223; M'Clures v. Hammond, 1 Bay. 99; Harrington v. Lyles, 2 Nott and M'Cord's R. 88. This latter was the case of a boat engaged in the carrying trade, which upset in the Santee Canal, with a cargo of cotton on board, which was thrown into the water. The defendant proved that he was unusually careful, and a skilful patroon; that his boat was one of the best of her class, competent to carry the cargo then on board, and manned by a competent crew; that after she entered the Congaree River, she was lashed to another boat of the same size, to guard against any accidents from upsetting, but that it became necessary to separate them to pass the canal; and that the day on which they entered the canal, an incessantly heavy rain had fallen, which wet the bales on top. One of the witnesses stated, that it was apparent that the boat was, from that cause, top-heavy after she was separated from the other; that they remained that night in the canal; and that the defendant, to guard against her upsetting, lashed her to the bank, and set poles on the opposite side (a precaution rarely resorted to), and remained on board himself until she went over, about midnight, without any obviously recent cause. It also appeared, that the cotton injured was at the bottom of the boat, and resulted from the dripping of that on top; and the probability was, that if it had been laid on the bank and suffered to drain, no injury would have been sustained. The jury found a verdict for the plaintiff for 225 dollars. A motion for a new trial was refused, the Court holding that in addition to the liability of a common carrier for all losses, except those occasioned by the act of God and the enemies of the country, there was in this particular case

184. It is proper to observe, that the rule which holds common carriers in vessels upon the high seas to the strict liability which we have defined, applies with all its force, and with equal propriety, to carriers upon the inland waters of our country. The vast and increasing produce of the interior, finds its way, in a great measure, through these natural avenues of communication to the seaboard, and demands the same protection during this transit as upon the sea.[1]

185. When the unseaworthiness complained of is the incompetency of the crew, the owner, to exonerate himself from liability for loss, must show that in point of fact the crew was competent. In a recent case, where the master of a vessel was charged with having sailed on a voyage from the coast of Africa, with a sick and incompetent crew, whereby delay was caused, and damage ensued to the cargo, and a loss of price in selling it, it was held that the libellants (it was a libel *in rem*) were not entitled to recover simply upon the ground of what subsequently happened. On the contrary, in such a case the question is, what were the facts on which the master was called to exercise his best judgment at the time he sailed, not what happened afterwards. It was held too, that the evidence of the crew as to their own

negligence. The carrier should not have unloaded his boat when the cotton was dripping with water from the canal.

[1] Harrington v. Lyles, *supra;* Rutherford v. M'Gowen, 1 Nott & M'Cord, 17; Cook v. Gourdin, 2 Ibid. 19. The latter cases extend the doctrine to even ferry owners. Richards v. Gilbert, 5 Day, 415.

health, if it can be had, must control, in opposition to the testimony of persons experienced in the trade of the African coast, as to the effect of the given sickness upon the crew, and the propriety of the master's leaving without additional hands. Their opinion, of course, must depend upon the extent and degree of the sickness, and where these are unknown by the testimony of the attending physician, or other competent person, who was present at the time and place of sickness, the opinion rests upon no data. If, therefore, the testimony of the physician cannot be obtained, then the crew themselves are the best witnesses.[1]

186. The master, both on his outward and homeward voyage, in sailing down rivers, out of harbors, or through roads, &c., where, either by the usage or the laws of the country, a pilot is required, is bound to take one on board.[2] A vessel coming out of a har-

[1] The Gentleman, Blatchford's Rep. 196.

[2] Keeler v. Firemen's Ins. Co., 3 Hill, 250; M'Mullan v. U. Ins. Co. 1 Rice (S. C.) R. 248; Bolton v. Amer. Ins. Co., cited 3 Kent, 176, note (*a*); Law v. Hollingsworth, 7 T. R. 160; Phillips v. Headlam, 2 Barn. & Ad. 384; Dixon v. Sadler, 5 M. & Wels. 405. The opinion of Baron Parke, in this latter case, will repay an attentive perusal. His observations relate to the liability of underwriters, but he points out with great clearness the duty of the insured. "If the insurance," he remarks, "attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk, and if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the insured makes no

bor, must have a pilot on board, because the captain has it in his power always to procure one. But when he arrives off a port, as the law compels no one to perform impossibilities, it only requires that

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warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases of Burk v. Royal Ex. Co., 2 B. & Ald. 72; Walker v. Maitland, 5 B. & Ald. 171; Holdsworth v. Wise, 7 B. & Cr. 794; Bishop v. Pentland, Id. 219, and Shore v. Bentall, Id. 798, note. Nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of navigation. . . . . If there be any fault in the crew, whether of omission or commission, the insured is not to be responsible for its consequences. . . . . The only case which appears to be at variance with this principle, is that of Law v. Hollingsworth, *supra*, in which the act of the pilot who had been taken on board for the navigation of the river Thames, having quitted the vessel before he ought (under what circumstances is not distinctly stated), appears to have been held to vitiate the insurance." But Baron Park considered this case to be overruled by the later cases, and said that he could not help thinking that the absence, from any cause to which the owner was not privy, of the master, or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle, he said, established by the more recent decisions is, that if the vessel, crew, and equipments, be originally sufficient, the insured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the insured, which is the object of the contract of insurance. 3 Kent, 175. Abbott on Shipp. 422. But see The General Mutual Ins. Co. v. Sherwood, Law Rep. (May No.) 673.

the master use all reasonable efforts to obtain one. In every well-appointed port where pilots are to be had, a vessel arriving upon pilot ground, is bound to make the approach carefully. If in the night, the master must hold out a light for a pilot, and wait a reasonable time for one, and approach one if he can do it with safety. If he attempts to enter the port without a pilot, or steers negligently or rashly in approaching the ground, when it is unsafe to navigate without a pilot, and damage ensues, the underwriters are discharged from liability.[1]

187. If, however, the vessel pass uninjured through the dangers, to avoid which a pilot is usually employed, and the loss happens at a point beyond which the pilot's services cease to be necessary, the insured would be entitled to recover. This was the position taken by the Court of Appeals of South Carolina, in the case of M'Mullan v. U. Ins. Co.[2] It

[1] Phillips v. Headlam, 2 B. & Ad. 384; Bolton v. Am. Ins. Co., *supra*; M'Mullan v. U. Ins. Co., 1 Rice's S. C. R. 248.

[2] *Supra.* See also, Keeler v. Firemen's Ins. Co., 3 Hill. R. 250; Am. Ins. Co. v. Ogden, 15 Wend. 532. Where a vessel arrived off a harbor towards evening, there being indications of bad weather during the night, and the captain *unable to obtain a pilot*, determined to follow a pilot-boat up the bay, and in so doing the vessel ran aground; such grounding cannot be imputed to the fault or misconduct of the captain. Whilst aground, the captain ordered the deck load, consisting of casks of brandy, to be thrown overboard. But this being impossible, their heads were knocked out to allow the liquor to escape through the scuppers. It was held, that such a state of facts would not sustain a charge of want of skill, or of misconduct, against the captain; and that the brandy was lost by "peril of the sea." Van Syckel v. Ewing, Crabbe's R. 405.

was also considered by the Court, that the employment of a pilot in coming into or leaving a particular port, is not a part of the seaworthiness of the vessel. "Nothing," said Judge O'Neall, in delivering the opinion of the Court, "can enter into *that* which is not for the whole voyage. The business of a pilot is merely temporary. He is a part of the crew of a vessel for only a few miles, or a few hours. He navigates her only occasionally. Under such circumstances, it would be an abuse of terms to say that a competent pilot was necessary to make a vessel seaworthy. The true notion seems to me to be this: if a vessel without a pilot sustain injury in entering or leaving a harbor, where it is customary to have a pilot; that then such injury does not come within the perils insured against. It is not a peril of the sea; it is a loss from the bad navigation of the vessel, and is to be set down to the fault of the master, and consequently the owners would be liable for it. The general rule is, if the owners would not be liable for the loss, that then the insurers are."[1]

188. In rivers, roads, &c., where it is not customary to take a pilot on board, the captain or mate being duly qualified, or any other competent person may be relied on. If, however, in such a case, injury arises from want of ordinary prudence in the

[1] The position assumed in this case is a novel one. It seems to be taken for granted in the books of reports, and by the text writers, that a vessel is not seaworthy, within the implied warranty, if she proceeds without a pilot, where it is customary to take one. This is the first and only case that I have been able to find, where a contrary doctrine has been laid down.

navigation of the vessel, the owners are liable to the shippers.[1]

189. In respect both to the lading and carriage of the goods, the master is chargeable with the most exact diligence. His responsibility with respect to them begins when that of the wharfinger ends, and when they are delivered to some accredited person on board the ship. If he receives them at the quay or beach, or sends his boat for them, his responsibility attaches from the moment of the receipt.[2] Not only is the master responsible with respect to the safety and security of the goods, but, as we have had occasion elsewhere to observe, the vessel is also liable. It stands as the shipper's security, and is by the maritime law hypothecated to him for his indemnity. The duties of the master as carrier extend to all that relates to the lading, transportation, and delivery of the goods. And for the faithful performance of those duties the ship stands pledged, as well as the master and owners personally.[3]

190. The goods must be safely stowed under deck. That is the contract implied by the bill of lading. If they are carried on deck, without the consent of the shipper or the sanction of custom, the carrier is responsible for their safety; and if they are lost from the dangers of the seas, he cannot protect himself

[1] Keeler v. The Firemen's Ins. Co., 3 Hill, R. 250.

[2] The Waldo, Davies' Ad. R. 161; 3 Kent's Com. 206; Abbott on Shipp. 423; Molloy, book 2, chap. 2, sect. 2; Roccus, note 88.

[3] The Paragon, Ware's R. 322; The Rebecca, Id. 188; The Waldo, *supra*.

from responsibility by showing that they were lost or damaged from that cause. He must go further, and show that the calamity would have been equally fatal, even if they had been secured below deck. If, from stress of weather, it becomes necessary to throw them overboard for the common safety, this will not be a loss to be divided with the rest of the cargo, by a general average, but will be the particular loss of the master and the ship-owners, who are responsible for his acts.[1]

191. The bill of lading binds the master to secure and carry the goods in the usual way, that is, under deck. Where the contract of affreightment is verbal, it will, in the same manner, be presumed to be a contract to stow and carry the goods in the usual way, unless a custom or different agreement is proved. A local custom, in order to be binding on the parties, and withdraw their contracts from the application of the common law, must be so generally known and understood that it may fairly be presumed that all persons engaging in that particular trade are acquainted with it and assenting to it, as they are presumed to know the general law. The presumption then will be, that they form their engagements with a silent reference to the special custom. And the custom, to be obligatory, must not be a loose practice, but precise, definite, and certain, so as to supply the place of the common law in the given case, and

[1] See the foregoing authorities and Abbott on Shipp. p. 423, note (2). The reader will find the cases, respecting commercial usages, numerously collected and ably analyzed in 1 Smith's Leading Cases, pp. 582, 595. (Last American Edition.)

be capable of being applied to the contract, and defining and fixing the rights of the parties under it. Such a custom, when it is established, and so generally known and recognised that parties are presumed in their engagements tacitly to refer to it, applies itself to the contract, and forms, as it were, the complement to the terms in which the obligation is expressed by the parties, and within its proper sphere is equally binding with the general law.[1]

192. If, however, there is a written and express contract, by which the parties have fixed and defined their obligations and duties, it cannot be controlled or varied, or contradicted by a usage or custom; for that would be, not only to admit parol evidence to control, vary, or contradict written agreements, but it would be to allow mere presump-

[1] The Paragon, Ware's R. 322; The Reeside, 3 Sum. 567. "The true and appropriate office of a usage or custom," said Judge Story in this case, "is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary or control a usage or custom; for the latter may always be waived at the will of the parties." See also The Waldo, Davies' R. 160; Vernard v. Hudson, 3 Sum. R. 405.

tions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties.[1] Hence it is, that evidence is not admissible to vary the common bill of lading, by which the goods were to be delivered in good order and condition, the danger of the seas only excepted, by establishing a custom that the owners of packet vessels, on that particular route, should be liable only for damage to goods occasioned by their own neglect.[2]

193. If there be a clean bill of lading, that is, if it is silent as to the mode of stowing the goods, and contains no exceptions to the master's liability, but the usual one of the dangers of the seas, or if there be a charter-party in the like form, the law presumes that the goods are to be carried under deck. The usual, and only safe mode of carrying goods, is under deck, and when the contract is entered into, it is presumed to be the intention of the parties that the goods shall be stowed and carried in the usual way, unless there is a special agreement to the contrary. This is a condition that is silently understood by the parties, and implied by the law. A bill of lading, therefore, imports, unless the contrary appears on its face, that the goods are to be safely secured under deck. And no usage can be permitted to control, vary, or contradict that meaning.[3]

[1] Vernard v. Hudson, 3 Sum. R. 405; Knox v. The Schooner Ninetta, Crabbe's R. 534. [2] Ibid.

[3] The Waldo, Davies' R. 160; Curtis's Merchant Seamen, 213; The Reeside, 2 Sum. 322; Vernard v. Hudson, 3 Sum. R. 405; Barber v. Brace, 3 Conn. 9.

194. The presumption of law, however, in such a case may be rebutted, not only by showing a positive agreement between the parties that the goods are to be carried on deck, but from other circumstances, such, for example, as the goods paying the deck freight only. The admission of proof to this effect is perfectly consistent with the rules of law; for it neither contradicts nor varies anything contained in the bill of lading; but it simply rebuts a presumption arising from the ordinary course of business.[1] And where goods are shipped under the common bill of lading, at an under-deck freight, but are carried on deck, and finally delivered without damage, the ship-owner is entitled only to a deck freight.[2]

195. It is then only in the case of a parol shipment, that the master is allowed to show a local custom to carry goods on deck in the particular trade. But it must be a custom so generally known and recognised, that a fair presumption arises that the parties in entering into their engagement, did it with a silent reference to the custom, and tacitly agreed that their rights and responsibilities should be determined by it.[3]

196. If goods are put on board without the knowledge of the master, he may put them ashore. The

[1] Vernard v. Hudson, *supra*. If the presumption of law can be rebutted by an inference arising from one fact, viz., the payment of half freight, why may it not be rebutted by an inference arising from another fact, that is, the existence of an established custom?

[2] Ibid.

[3] The Paragon, Ware's R. 322; Curtis's Merchant Seamen, *supra*.

contract of affreightment, like all other contracts, requires for its completion the consent of parties, either express or implied. In such a case, therefore, there is no contract, and consequently no obligation on one part or the other; and hence the master, who finds the merchandise in his vessel, may put it ashore, and charge the expense of unloading to the owner. But if the goods are not discovered until after the ship sails, the master may discharge them at an intermediate port, provided the vessel is overloaded. He is bound, however, to leave them in a place of safety, and give the owner notice. If, on the other hand, the vessel is not overcharged, he must carry them on to the port of destination. These are the principles laid down by Pothier and Valin,[1] "and are recommended," says Judge Ware,[2] "as well by

[1] Pothier, Traité de Contrat de Charter-Partie, No. 10, 12; 1 Valin, 647. See also Ordonnance de la Marine, Liv. 3, Tit. 3, Art. 7; Code de Commerce, No. 292.

[2] The Huntress, Davies' R. 82, 90. The Huntress was, in the strictest sense of the word, a common carrier, making her trips daily between Portland and Boston. "Her goods on freight were owned by a great variety of persons, were brought in small quantities, loaded in a hurry, ordinarily without the formality of a bill of lading, and often, as in this case, accompanied by their owners. The owners of the boat, by the nature of their employment, engaged, and were bound to take the goods of all persons who offered them, without any special contract for that purpose. Holding themselves out generally as ready to carry freight or passengers, the public have a right to take them at their offer, and they are not at liberty to refuse without good cause; and those who wish for a passage, or have goods to be transported, need not take the trouble to make a contract beforehand. They understand that the master is bound to allow them a passage, and to carry their merchandise, unless he has some valid excuse, and they go down to the boat prepared to go on board, and take their goods with them.

public convenience as by their pure and honorable morality."

197. It is the duty of the shipper or owner of goods to have them properly marked, and present them to the carrier or his servants, to have them entered in his books. If he omits to do this from neglect or otherwise, and there is a misdelivery and loss in consequence, without any fault of the carrier, he must bear the loss.[1]

198. Nor is the owner of the ship responsible for any loss or injury to the goods, if they were brought on board by the master furtively and beyond the scope of his authority, unless, indeed, he afterwards adopts the act of the master.[2] So, too, if the shipper consigns his goods to the master for sale and returns, in proceeding to dispose of them, he does not act

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Now it appears to me, that if the goods are put on board in the ordinary manner, a contract results from the fact itself. In the present case, the owners of the boat held themselves out as ready to carry freight for all persons generally, and if the libellant had his goods carried to the wharf, and they were taken on board in the usual course of the business, as other goods were, he accepted their offer, and it appears to me the contract was complete; but if it was not, it was ratified and made perfect by the payment and acceptance of the freight." This was the decision of the Roman law. "Whether the goods," says Ulpian, "are shipped by a bill of lading or not, the contract is complete by the simple fact that they are taken on board; the carrier becomes responsible for their safety." But this must be understood of goods put on board in the usual way, and not clandestinely or furtively. See post, Tit. "Conveyance in a General Ship."

[1] Ibid.

[2] Walter v. Brown, 11 Mass. R. 99.

under any authority derived from his appointment as master, but in an entirely new character, that of supercargo or factor. And his duties and liabilities under these two characters are as distinct and independent as they would be if the trusts were confided to different persons. In all that relates to the transportation of the goods and navigation of the ship, he acts as master, and all that he does in relation to the disposition of the merchandise, is referred to his character as factor. His acts are imputable to the ship-owners only so far as he acts as master. Their responsibility does not go beyond that limit.[1] As consignee, the master neither represents the vessel nor its owners. And for any want of fidelity in that trust, his employers have the same remedy against him as they would have against any other person, and no other. As the ship-owners are not liable *in personam*, neither is the vessel liable *in rem*.[2]

199. Where there is a usage well known and established, not only as to the manner of stowage, but as to the different articles and products to be stowed together,—such, for instance, as the stowage of barrels of flour and bags of corn upon the top of hogsheads of sugar,—both the carrier and the shipper are bound by it. The carrier is bound to stow in the accustomed manner, and the shipper is chargeable with notice that his goods will be thus stowed.

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[1] The Waldo, Davies' R. 160; Williams v. Nichols, 13 Wend. R. 58. See also Kemp v. Caughty, 11 John. R. 107; Emory v. Horsey, 4 Greenl. 407.

[2] The Waldo, *supra*.

If he wishes them stowed in a different manner, he is bound to give the requisite instructions. If he gives no special instructions, and his goods are stowed in accordance with the usage, he is deemed to have assented to the mode of stowage, and cannot, in case his goods are injured on the voyage in consequence of the mode of stowage, set that up as a ground of complaint, or as a foundation for depriving the owners of the vessel of their freight.[1]

200. In the absence of any established usage as to the manner of stowing goods, or as to the different articles to be stowed together, it is nevertheless the duty of the master so to stow and arrange the different articles of which the cargo consists, that they may not be injured by each other or by the motion or leakage of the ship.[2] If damage arises from bad stowage or cooperage, the ship is responsible for it. Thus, where a ship sailed from New Orleans for New York, with a cargo of tobacco in hogsheads, and lard in barrels, and when seventeen days out, without having met any very rough weather, lard was pumped from her, and the tobacco damaged by the lard running into it, it was held, that the damage was occasioned by some cause other than the perils of the sea, such as bad stowage or cooperage, and the ship was liable for it. It was also held, that if, under such circumstances, a peril of the sea, subse-

[1] Baxter v. Leland, Blatchford's R. 526; Barber v. Bruce, 3 Conn. 9.

[2] Abbott on Shipp. 425; Swainston v. Garrick, Law Journal, N. S. vol. 2, 255; The Newark, Blatchf. R. 203; The Reeside, 2 Sum. 567.

quent to the first pumping of the lard, and wholly unconnected with the fault of the carrier in the defective stowage or cooperage of the lard, is set up as the cause of the damage, the evidence should be clear and undoubted in order to exonerate the carrier from liability.[1]

201. If by usage or agreement, the stowage of the cargo is to be performed by persons hired by the shipper, or if the shipper appoints his own stower, the master is exonerated from his liability. And if the freighter, by a verbal agreement with the owner, undertakes to appoint his own stower, and he acts as such, the mere silence of the charter-party, subsequently entered into, does not subject the master to his original liability.[2] "The master," says Lord Lyndhurst,

[1] The Newark, *supra*; see, also, The Reeside, *supra*. It was held, in this latter case, that the mere rolling of a vessel by a cross sea is not a danger of the sea that will excuse the carrier. "Bad stowage," says Mr. Curtis, "may be either from an improper and defective arrangement, so that the goods are damaged by contact or by the leakage of the vessel; or from taking on board goods packed or coopered improperly, such as oil or vitriol, whereby other goods are injured through a leakage of the casks, occasioned by any stress of weather that is not fairly within the meaning of 'perils of the seas.' These defects the master undertakes by his contract, whether written or verbal, to provide against; and the meaning of the exception, 'perils of the seas,' which is ordinarily introduced into bills of lading, and which the law implies, in the absence of a written contract, includes only those injuries occasioned by some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." Merchant Seamen, 213, 214; see the recent cases of Clark v. Barnwell, 12 How. R. 273, and Rich v. Lambert, Id. 347.

[2] Swainston v. Garrick, *supra*.

"as servant of the owner, is bound to superintend the stowage, and if in consequence of improper stowage the owner has been called upon, and has satisfied any claim for damages, the master is liable to him. But where the master is told by the owner, that some one will come to superintend and do that, which would otherwise be his duty, he is exonerated. If afterwards that intention is changed, the owner should communicate it to the master."[1]

202. If the goods are stowed according to the usage, or if the shipper is warned as to the mode of stowing, damages cannot be recovered for any injury occasioned by bad stowing.[2] The usage of trade is to carry salt between decks, and the master is not culpable for stowing it in that way, if he takes good care to stow and pack it well, and secure it with proper dunnage. When this is done, and damage is occasioned by the drainage of the salt coming in contact with sea water, shipped from the violence of a storm, or stress of weather, it will be attributed to a peril of the sea, and the carrier is exonerated. Where the injury to the goods is of such a nature, that it must necessarily have accrued in the course of the voyage, the *onus probandi* is upon the carrier, in order to excuse himself, that it was occasioned by one of the perils of navigation within the exception in the bill of lading. If he shows that the damage was occasioned by the effect of humidity and dampness, which in the absence of any defect in the ship,

[1] Swainston v. Garrick, *supra*.

[2] Major v. White, 7 Carr. & P. 41; Barber v. Bruce, 3 Conn. 9; Baxter v. Leland, Blatchf. R. 526.

or navigation of the same, or in the stowage, is one of the dangers and accidents of the seas, then he is not liable.[1] We may here observe, that, at common law, if a person ship goods on board a vessel, knowing that it is chartered, the consignee of the goods can maintain no action against the owner of the ship, if the goods be injured by bad stowage.[2] But in Admiralty, the ship is specifically liable, no matter whether let by a charter-party or not, and equally so, whether the shipper knows that she is chartered or is ignorant of the fact.

203. It is in all cases the duty of the master to provide ropes, &c., proper for the actual reception of the goods into the ship, and for their safe unlading. He is responsible for the sufficiency of the tackle which he uses. If the goods, a cask, for instance, is accidentally staved in letting it down into the hold of the ship, or in unlading it, the master must an-

[1] Rich v. Lambert, 12 How. U. S. R. 347; Clark v. Barnwell, Ibid. 272. If the damage has proceeded from an intrinsic principle of decay, naturally inherent in the commodity itself, whether active in every situation, or only in the confinement or closeness of the ship, the merchant must bear the loss as well as pay the freight; as the master and owners are in no fault, nor does their contract contain any insurance or warranty against such an event. Abbott on Shipping, 517; 12 East, 381; 4 Campb. 119; 6 Taunt. 65. But if it can be shown that it might have been avoided by the use of proper precautionary measures, and that the usual and customary methods for this purpose have been neglected, they may still be held liable. And the same rule applies in the case of damage, on account of the humidity and dampness of the ship, which is, more or less, incident to all vessels engaged in trade or navigation, especially upon the high seas. Clark v. Barnwell, *supra*.

[2] Major v. White, *supra*.

swer for the loss.[1] So, too, he must furnish the ship with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality.[2]

204. More goods must not be taken on board than the ship can conveniently carry, leaving room for her own furniture and provisions of the crew, and for the proper working of the vessel. If the master does so, he and his owners would be liable for the consequent damage. If he agrees with a shipper that he will take in only a certain cargo, and violates his contract, he assumes, it has been held, the risk and responsibility of an insurer. Thus in the case of The Schooner Ninetta,[3] grain was shipped on board the vessel, on condition that no other cargo should be taken, and that it should be carried directly to the port of destination, without deviation. The master however deviated, and took in additional cargo. It was alleged, that in consequence the grain was damaged. "The greatest difficulty I have had in this case," said Judge Randall, "has been to determine whether this damage was occasioned by the fault or improper conduct of the captain, in putting into the Piankitank; but when I reflect that this was in violation of an express contract with the

[1] Abbott on Shipp. 425; see Mott v. Laraway, 14 Wend. 225.

[2] Abbott, *supra*. He cites Ordin. of Rotterdam, 2 Magens, 101, art. 125, 126.

[3] Crabbe's R. 534; see also Crosby v. Fitch, 12 Conn. 410; Davis v. Garrett, 6 Bing. 716. The reader will find the question adverted to in the text, more fully considered in the chapter upon the Carrier's Responsibility, post, chap. 12.

shipper, who was put to considerable trouble and expense in order to obtain the exclusive use of the vessel, I think the party who violates such a contract, and takes in additional cargo without the consent of the first shipper, assumes the risk and responsibility of an insurer, and should be liable for any loss that may afterwards occur." But this position has been questioned, and the authorities are in conflict. Assumpsit was brought in the District Court of Philadelphia for the recovery of the same freight that was libelled for in the Admiralty. There was an appeal from the decree in the Admiralty to the Circuit Court. While the appeal was pending, the cause came on for trial in the District Court of Philadelphia, and the verdict was for the plaintiff. Upon a writ of error from the District Court, it was held by the Supreme Court of Pennsylvania, that a decree in Admiralty appealed from, could not be pleaded as a former recovery, and also, that an unnecessary deviation, and injury ensuing to the cargo, is no defence to an action for freight, except so far as the loss was occasioned by the deviation, and that where the master of a vessel who has contracted to carry no other cargo, and in violation of his contract takes additional cargo, an injury ensuing is no defence, except so far as the damage resulted from the breach of contract.[1]

The master must not take on board any contraband goods, whereby the ship and other parts of the cargo may be liable to forfeiture or detention.[2] A

[1] Souter v. Baymore, 7 Barr, 415; see also Hart v. Allen, 2 Watts's R. 114; Reed v. Dick, 8 Watts, 480.

[2] Abbott on Shipping, p. 425.

charter-party, by which the owner agrees to receive on board "all such lawful goods and merchandise" as the charterers "think proper to ship," for a certain sum, to be "in full for the entire capacity of the ship out and home," must be construed in conformity to the principles of law, with respect to the lading of a vessel.[1]

205. The stipulation to receive all such lawful goods as the defendant offers to put on board is an ordinary one in the printed forms, and refers to their kind and quality, rather than to their amount and quantity. If lawful, that is, if not contraband, nor diseased, they are to be received, whether heavy or light, bulky or compact, agreeable or disagreeable. This is the reasonable signification applicable to such a stipulation. If another interpretation were adopted, and the owners were subjected to receive any quantity of goods, however heavy, which the shippers might choose to offer, the vessel might be so overloaded with heavy articles as to sink at her anchorage, before she was filled, or go down in the first gale, which would involve the absurdity, that the parties agreed to the insertion of a clause, and that an ordinary one, with a meaning attached to it, which would be likely to produce at times a total loss of both vessel and cargo.[2]

206. The proper limitation and signification of the

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[1] Weston v. Minot, 3 W. & M. R. 436.

[2] Ibid. *supra;* Jacobson's Sea Laws, p. 94, and note; see, also, Micheson v. Nicoll, 19 L. T. 229; S. C. American Law Reg. 49.

words, "entire capacity" of the vessel, are, her entire capacity without danger to her safety. This construction, in case of light goods, might fill her entirely, without such danger, and without making her too deep, whereas, in case of very compact and heavy goods, if filled entirely, she might be so deep as probably to sink in the first gale or strong swell. The place and season, when and where the voyage is to be performed, the ordinary depth of loading vessels of her size, tonnage, shape, and draft, when employed in the particular trade, are some of the elements to be considered in forming a correct judgment what a vessel can carry safely. Whether there is an express agreement in the charter-party, that the vessel shall receive no more than she can safely carry or not, is immaterial, for the law will imply that.[1]

[1] Weston v. Minot, *supra*. See also, Hunter v. Fry, 2 Barn. & Ald. 421. "It is usual for the master or mate," says Mr. Abbott, Shipping, p. 424, "to sign a receipt for goods at the time of the shipment, and deliver it to the shipper. When this is done, the master must take care not to deliver a bill of lading until a receipt is returned to him; for otherwise he may place himself under a twofold responsibility; a responsibility to the shipper, in case he shall require the goods to be delivered to his own order, and have a legal right to do so; and a responsibility to a holder of the bill of lading, who may be induced to purchase the goods on the faith of it. And if such a receipt is required, it ought to be given, and if not given, still the master must take care not to deliver a bill of lading to any person but the shipper without his orders, for if he does, he may incur a twofold responsibility in the same way, as if the required receipt had been given." He cites the following authorities: Craven v. Ryder, 6 Taunt. 433, 2 Marsh, 127; Hawes v. Watson, 2 B. & C. 540; Buck v. Hatfield, 5 B. & A. 632.

With respect to overlading the ship, Mr. Lawes, in his work on Charter-Parties, p. 37, observes as follows: "It is said by Malyne,

207. In respect to contraband goods and the ship's documents, it will be necessary to examine the ge-

in his chapter on affreightment by charter-party, that if the master take on board more lading than the acknowledged burden of the ship, especially if it consist of other persons' goods than the freighters, he loses his whole freight, for by this he may endanger the merchant's goods which he has contracted to carry; and in such case, if any part of those goods are cast overboard in a storm, the loss shall not be made up by contribution or average of the merchant, but by the master's own purse. Mal. 99. Malyne also further lays it down, that if any man compel the master to overburden the ship or boat, he may be accused criminally, besides being compelled to pay the damages happening thereby. Id. Nearly to the same effect, Beawes observes, that if the master lets out his ship, and afterwards secretly takes in other goods unknown to the first freighter, *by the law marine*, he loses his freight; and if it so happen that any of the freighter's goods, for safety of the ship, be cast overboard, the rest shall not become subject to the average, but the master must make the damage good; though (according to Beawes), if the goods be brought into the ship secretly and unknown to him, it is otherwise. Beawes, 137. The observations of both these writers seem to be founded upon one of the laws of Wisby, which provides, that the ship being laden, the master must not take in any more goods without the merchant's leave; and if he fails therein, in case there be casting of the goods overboard, he shall be a loser by so much more commodities as he has taken on board over and above what he ought. Therefore, upon the lading of the ship, he ought to declare his intention to take such and such goods. Leg. Wis. 46. But though this seems to be the marine law upon the subject, the rule of the common law, in the absence of any express provision in the charter-party on the subject, in analogy to other cases, seems to be this: that if the master overloads the ship by putting on board more than she can reasonably stow and carry, over and above her tackle, &c., by which a damage happens to the freighter, his so doing would be a breach of the implied covenant in the charter-party, not to do so, by the words, 'that he will load and stow all such goods as shall be sent alongside, not exceeding what the ship can reasonably stow and carry,'" &c.

neral doctrines of foreign Courts. I shall do this as briefly as consists with the requisite particularity. A neutral nation has nothing to do with the war between belligerents, and is under no moral obligation to abandon or abridge its trade. But on the other hand, that law which coerces the action of nations as well as individuals, the law of necessity, gives to the powers at war, the right to seize and confiscate such goods as the law of nations deems to be contraband. And this they may do upon a principle of self-defence. But as has been justly observed, the right of the hostile power to seize, does not destroy the right of the neutral to transport. A trade by a neutral, therefore, in articles contraband of war, is a lawful trade, though a trade from necessity, subject to inconvenience and loss.[1]

208. As, therefore, a trade in contraband goods is

[1] Seton v. Low, 1 John. Cas. 1. In this case, which was an action on a policy of insurance, it was held, that articles contraband of war were lawful goods, within the meaning of the policy, that goods not prohibited by the positive law of the country to which the vessel belongs, are lawful; and that the insured are not bound to disclose to the insurer, that the goods insured are contraband of war. See to the same effect, Barker v. Blakes, 9 East, 283. But in Richardson v. Maine Ins. Co., 6 Mass. 102, it was held, that if goods contraband of war are on cargo, the insurer is not responsible for their capture and condemnation on that account, unless either with a full knowledge of the nature of the goods, and of the voyage, or by an express undertaking, he shall insure them against such capture. And the same doctrine will be found in the subsequent cases in the same volume of Reports, pp. 122, 124, 277. But see Juhel v. Rhinelander, 2 John. Cas. 121, S. C. 487; Skidmore v. Derdoity, 2 John. Cas. 77; Phillips on Ins., vol. i. 100, et seq.; The Santissima Trinidad, 7 Wheat. 283.

not prohibited by the law of nations to a neutral, it follows that such trade is lawful, and being so, the insured is not bound to disclose to the insurer, that the goods insured are contraband of war.[1] Mr. Justice Story, in his last edition of Abbott on Shipping, proposes a question, which would seem to be solved by the foregoing principle.[2] The question is this: when contraband goods are taken on board with the consent of the owner of the ship, how far, if they should subject the other innocent shippers to detention or expenses, the owner of the ship would be liable to them in damages. That, he observes, may depend eventually upon the consideration, whether there be any implied warranty on the part of the ship-owner, that no contraband goods shall with his knowledge be put on board. If indeed any loss occur by the wrongful act of the master or owner in the course of the voyage, as in case of fraudulent conduct in case of capture, &c., the shipper is entitled to an indemnity. But the point here is, whether in a shipment in a general ship, the ship-owner takes any risk as to any part of the cargo being contraband or not, or the shipper takes that risk on himself.

209. If the principle that governs in analogous cases, that is to say, in cases of insurance, is applicable to the relation between the carrier and the

[1] Authorities the same as in the foregoing note.

[2] Page 426. The term contraband originated during the Crusades, when the Genoese and Venetians conveyed munitions of war and necessaries to the Saracens; and the Pope placed those who engaged in the trade under the *bann*. Thus it was a trade *contra bannum*. Jacobson's Sea Laws, p. 97.

shipper, and we apprehend that it is, then the carrier is exonerated from any loss that may occur to a shipper, from a part of the cargo being contraband. His taking contraband goods on board is lawful. The shipper knows or is presumed to know that fact. He takes his choice of shipping his goods in company with such a cargo, or putting them on board some other vessel. He voluntarily does that which may subject him to loss or inconvenience, and he must abide the result of his own conduct. But Roccus determines otherwise in the case of prohibited articles, and justly, for in that case it is unlawful to put them on board.[1]

210. The capture of contraband goods on board a neutral ship, does not affect other innocent goods on board, unless they belong to the same owner. To

[1] Note 76. The case of prohibited articles is widely different from contraband. In the former case, the prohibition makes the trade absolutely unlawful, and, therefore, the master is culpable, if he takes on board prohibited goods which may subject the innocent part of the cargo to confiscation or inconvenience. He is justly held liable for any injury that may result from so doing. In the latter case, the trade is not unlawful, and for the reasons stated in the text, we do not think the master culpable, and therefore liable for consequent loss or injury to the innocent portion of the cargo, from engaging in such trade. But *Straccha* holds the opposite doctrine. "If a ship," he says, "has been detained and prevented from performing her voyage by the fault of the master, as for instance, *if he had contraband goods on board, he is responsible to the freighter or shipper.* For it is but justice that he who committed the fault should suffer the loss." *Straccha*, Part 3, *de Navibus*, § 25, p. 426. If the view we have taken of the subject is correct, then the master is not *in delicto*, and, therefore, not justly chargeable.

escape from the contagion of contraband, the innocent articles must be the property of a different owner.[1] The ordinary rule of Prize Courts extends the penalty of contraband to all the property of the same owner, involved in the same unlawful transaction. This rule of course involves the ship in the penalty of contraband, as well as the innocent portion of the cargo, whenever the ownership of the whole property, including the contraband, which works the condemnation, is vested in the same person.[2]

211. When, however, the contraband goods belong to a part owner of the ship, the contraband penalty, or rather the penalty of contraband, affects only the interest of the part owner in the ship. His co-tenants are not affected. When the tainted goods

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[1] The Staadt Embden, 1 Rob. Ad. R. 26.

[2] The Sarah Christina, Ibid. 237; The Neutralitet, 3 Rob. 295. "The modern rule of the law of nations," observed Sir W. Scott, in this case, "is certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscable for that act. But this rule is liable to exceptions. When a ship belongs to the owner of the cargo, or when the ship is going on such service, under a false destination, or false papers: these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one." See also, The Jonge Tobias, 1 Rob. Ad. R. 329.

are unclaimed by their owner, who is known by the ship's papers, or other sufficient evidence, to be part owner of the ship, both will be condemned, that is, both the goods and the part-ownership.[1]

212. Goods contraband of war are of two descriptions: munitions of war, the property of a neutral, bound from a neutral port to the territory of either of the belligerents, after the existence of the war is known; and every species of neutral goods, bound from a neutral port to a port belonging to either of the powers at war, and known to be blockaded by the other power. The principle, therefore, on which a belligerent will capture and condemn as prize the goods of a neutral, bound to a port known by him to be blockaded, arises from the consideration, that all such goods are contraband of war.[2]

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[1] The Jonge Tobias, *supra*.

[2] Richardson v. Maine Ins. Co., 6 Mass. 102. It is a well-established rule, that a neutral carrier of enemy's property is entitled to his freight. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight; and in cases of a more flagrant character, such as carrying despatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted. The Commercen, 1 Wheat. R. 382, 387; The Sarah Christina, 1 Rob. 237; The Haase, Ibid. 288; The Emanuel, Ibid. 296; The Immanuel, 2 Rob. 101; The Atlas, Ibid. 299; The Rising Sun, Ibid. 104; The Maddonna del Burso, 4 Rob. 169.

212 a. By the modern law of nations, provisions are not in general deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. If destined for the ordinary use of life in the enemy's country, they are not in general contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his posts of naval or military equipment, they are deemed contraband. Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption. In such a case, the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities.[1]

213. Articles which are exclusively useful for warlike purposes, are always contraband when destined for the enemy; those of promiscuous use in war and in peace, only become so under particular circumstances. Among the latter class are included naval stores and provisions, as we have obsered in the pre-

[1] The Commercen, *supra*. The Jonge Margaretta, 1 Rob. 189. In relation to certain goods, which are often deemed contraband, such as pitch and tar, when they are the growth of a neutral country, and are on board of a ship of that country, they are now deemed entitled to a favorable consideration, and instead of being condemned, are subjected ordinarily only to a right of pre-emption. Story's Abbott, p. 426; The Twee Juffrowen, 4 Rob. 242, 244; Ibid. 161, 355; The Neptunus, 6 Ibid. 405.

ceding section.[1] If they are bound to a port of military or naval equipment, or are destined for the use of a hostile enemy, in that case they become contraband.[2]

214. Simply carrying contraband goods does not subject the ship to condemnation, as we have already seen, unless the goods and the ship belong to the same person. But any fraudulent or unneutral conduct on the part of the ship-owner, who has on board contraband goods, such as false papers, or a false destination, will subject the vessel to condemnation. Such too will be the effect of carrying enemy's troops or despatches, or engaging in the transport service of the enemy.[3]

215. The owner is bound to see that the ship is supplied with all the papers required by the laws of the country to which she belongs, and according to treaties and the laws of nations. This is a part of the implied contract of seaworthiness.[4] But while the ship must have on board such papers, the owner

[1] The reader will find the authorities numerously collected in 1 Wheat. 389, in a note, written, I presume, by Judge Story, as it is now known, since the publication of his Life and letters, that he was the author of most of the notes on prize law, contained in Wheaton's Reports.

[2] The Commercen, 1 Wheat. 382; The Jonge Margaretta, 1 Rob. R. 189; The Neptunus, 3 Rob. 80.

[3] The Franklin, 3 Rob. R. 217; The Edward, 4 Rob. 68; The Commercen, *supra*; The Friendship, 6 Rob. 420; The Atlantic, Ibid. 440; The Rapid, Edw. R. 228.

[4] Kent's Com., vol. 3, 205, and authorities cited. See also Bas v. Steele, 3 Wash. C. C. R. 381; Abbott on Shipping, 427; Jacobson's Sea Laws, Book I. ch. 4 and ch. 5; Book 2, ch. 3.

must see, on the other hand, that she has not on board any false or colorable papers, which may subject her to capture or detention.[1]

216. Where, however, the usage and course of the trade is such that the parties in interest know or ought to know, that certain papers properly ought to be on board for the purpose of protection in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to accomplish the object, that is, the protection of the property.[2]

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[1] Abbott on Shipping, *supra*. The documents and papers expected to be found on board a neutral ship are, says Lord Tenterden (note a), 1. The passport, sea-brief, or sea-letter. 2. The proofs of property, bill of sale, &c. 3. The muster roll. 4. The charter-party. 5. The bills of lading. 6. The invoice. 7. The log-book. 8. The bill of health. As to the documents required by our statutes, vide Story's Abbott, 427; Jacobson's Sea Laws, 68, note. The reader will find in this note a circular of the Hon. A. J. Dallas, of Feb. 25th, 1815, then Secretary of the Treasury, to the Collectors of the Customs of the United States, in which the several documents required by our laws and the law of nations are stated.

"If a master of a ship," says Roccus, "take on board prohibited articles, and on that account the cargo is confiscated, he is bound to make good the loss to the shippers. In like manner, if unlawful colors or signals are used by the ship, and the goods are in consequence forfeited and lost, the master is liable. A case of this kind occurred at Ancona. The master was sailing under Ancona colors during the war between the Emperor and France, and in passing by some Imperial territory he hoisted French colors, and was thereupon captured by the Imperial fleet, to the great injury of the merchants, although they recovered their goods. The master was condemned to make good the loss sustained by the owners of the ship and goods." Note 76.

[2] Livingston v. Maryland Ins. Co., 7 Cranch. R. 506, 536. See

217. By the Act of 1803,[1] it is made the duty of every master or commander of a ship or vessel belonging to citizens of the United States, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport with the consul, commercial agent, or vice-commercial agent, if any there be, at such port. In case of refusal or neglect of the said master or commander to deposit the papers as aforesaid, he shall forfeit and pay $500. In the case of Harrison v. Vose,[2] it was held that the arrival intended by the statute, was an arrival for purposes of business, demanding an entry and clearance, and stay at the port so long as to require some of the acts connected with business; and not merely touching at a port for advices, or to ascertain the state of the market, or being driven in by an adverse wind, and sailing again as soon as it changes.

218. Hence, where, as in the above case, a vessel arrived at the harbor of Kingston, Jamaica, and came to anchor at about a quarter of a mile from the town, but did not go up to the town, nor come to an entry, nor discharge any part of her cargo, nor take in passengers or cargo, nor do any business except to communicate with the consignees, by whom the master was informed that his cargo was sold, deliverable at Savannah la Mer, the master does not incur the statute penalty for omitting to deliver his papers to the consul.

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also Brown v. Shaw, 1 Caines' R. 489; Id. 549; 13 Mass. R. 173; 14 John. R. 396.

[1] Act U. S., 28 Feb. 1803, sec. 2.

[2] 9 How. 372.

## CHAPTER X.

### OF THE COMMENCEMENT AND PROSECUTION OF THE VOYAGE.

219. When the hatches of the vessel are properly caulked and secured, and everything in readiness for sailing, the master is to avail himself of the first fair wind and depart, otherwise he is answerable to the shippers.[1] He is culpable, if he sail in spite of wind and weather; for the voyage must be made according to the circumstances of the ship, time, and place, and according to the practice of skilful navigators.[2] Hence, the carrier is not responsible for delay in the voyage on account of boisterous weather or adverse winds, low tides, or the like. These are dangers and accidents of the navigation over which he has no control, and against which his contract contains no warranty.[3]

220. When the charter-party or bill of lading stipulates, that the vessel shall, with all convenient

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[1] Jacobson's Sea Laws, p. 100; Roccus, note 56; Lois D'Oleron, art. 2; Droit Mar. de Wisbury, art. 16. He is answerable, if the goods are lost or injured in consequence, or, I presume, if the market is lost by the delay. Roccus, *supra*.

[2] Roccus, *supra*; Curtis's Merchant Seamen, p. 215.

[3] Boyle v. M'Laughlin, 4 Harr. & J. 291; Clark v. Barnwell, 12 How. U. S. R. 272.

speed, sail and proceed to such a port, or so near thereto as she may safely get, the party is bound to sail in the stipulated manner; but whether he has done so, may depend upon a variety of considerations. In the first place, it may have been agreed that the vessel should be made seaworthy and fitted for the voyage. As, therefore, the parties did not contemplate the case of a vessel already seaworthy, &c., reasonable time must be allowed to make her seaworthy. An embargo in port, enemies at sea, and other causes, may or may not make it convenient or reasonable for her to sail. All these things must be judged of by a Jury.[1]

221. If the charter-party provides that the ship shall be ready and sail by a certain day, in that case the owners or captain will be liable to an action, if she does not sail by that day. Of course they will be excused, if the thing is rendered impossible by the day having passed before the execution of the contract, or they are prevented by any of the excepted dangers.[2]

222. Having commenced the voyage, the master must proceed to the destined port in the shortest, safest, and most usual course. If this be not done, and the ship, without just and reasonable cause, leaves the regular and customary track, it is a deviation, and from that time the policy of insurance is at an end, and the insurer is discharged from all subsequent responsibility.[3] If the cargo be injured

[1] Lawes on Charter-Parties. [2] Ibid.

[3] Roccus on Ins., note 52; Patrick v. Ludlow, 3 John. Cas. 10;

by tempest during such unnecessary deviation, the deviation is a sufficiently proximate cause of the loss to entitle the freighter to recover. The presumption of law is, that the deviation was the proximate cause of the disaster, but this presumption may be overthrown; and if it can be shown that the loss or injury was not the result of the deviation, but must equally have happened if there had not been any deviation, or in other words, if the deviation was not the cause of the injury, the master and owner are not answerable.[1]

223. It is no deviation to go out of the way to avoid danger. If the course of the voyage be altered from any just or necessary cause, such as to refit the vessel, or avoid a storm or enemies, or to relieve a vessel in distress, the policy of insurance is not discharged, nor is the ship-owner liable to the shipper for any loss or injury he may sustain in consequence.[2]

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Suydam v. Marine Ins. Co., 2 John. R. 138; The Ship Blaireau, 2 Cranch. R. 257, note; Abbott on Shipping, 441; Coles v. Mar. Ins. Co., 3 Wash. C. C. R. 150; Snowden v. Phœnix Ins. Co., 3 Binn. 466.

[1] Davis v. Garrett, 6 Bing. 716; 3 Kent, 210; see also Souter v. Baymore, 7 Barr, 415. If the *termini* of the voyage be fixed in the policy, the vessel cannot go out of the usual course of the voyage, notwithstanding she is permitted to stop and trade at any ports or places. Winthrop v. The Union Insurance Co., 2 Wash. C. C. R. 7; Coles v. The Marine Ins. Co., *supra*. See further upon the subject of deviation, Hand v. Baynes, 4 Whart. R. 204; Crosby v. Fitch, 12 Conn. 410; Hobart v. Norton, 8 Pick. 159; Davis v. Garrett, 6 Bing. 716.

[2] Roccus, note 52; Patrick v. Ludlow, 3 Johns. Cas. 10; Jacobson's Sea Laws, p. 551; The Boston & Cargo, 1 Sum. R. 328;

224. A deviation, for the purpose of saving the lives of the persons on board a vessel in distress, is a duty thrown on the master by the first principles of natural law, principles which, to the honor of American jurisprudence, are sanctioned by our tribunals. A deviation, therefore, for such purpose, does not discharge any insurance, nor render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby.[1]

225. But the master is under no obligation to lie by in order to save property, or to delay the proper progress of the voyage by gathering up the fragments of shipwreck, or other perils of the sea. Any stoppage, for the purpose of saving property, is a deviation from the voyage; and any going out of the usual course for such a purpose, being wholly unauthorized, will discharge the underwriters from all future responsibility. The maritime law, however, looking to the general benefit of commerce, upon a large and comprehensive policy, does not prohibit

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The Henry Ewbank, Ibid. 400; Mason v. Ship Blaireau, 2 Cranch's R. 240; Bond v. Brig Cora, 2 Washington's C. C. R. 80; Snowden v. Phœnix Ins. Co., *supra*.

In Souter v. Baymore, *supra*, it was held, that an unnecessary deviation, and injury ensuing to the cargo, is no defence to an action for freight, except so far as the loss was occasioned by the deviation. It was also held, that when the master of a vessel who has contracted to carry no other cargo, and in violation of his contract takes additional cargo, an injury ensuing is no defence to an action for freight, except so far as the damage resulted from the breach of his contract. See to the same effect, Hart v. Allen, 2 Watts' R. 114; Reed v. Dick, 8 Watts, 480.

[1] The Schooner Boston, 1 Sum. 328; The Henry Ewbank, Ibid. 400.

the master, under such circumstances, from deviating to save property in distress, if he deems it fit in a sound exercise of his discretion. As between himself and his owners, the usage of the world has clothed him with this authority; and in return for such extraordinary hazards it has enabled the owners to partake liberally in the salvage awarded for the meritorious service, when it is successful.[1]

226. In the case of Williams v. Box of Bullion,[2] it was held not to be a deviation for a vessel to go out of her course three miles to speak another at sea, on seeing a signal for that purpose; nor to delay three hours, to take from a foreign ship, bound to a foreign port, shipwrecked mariners of the United States, for the purpose of bringing them home. The case was distinguished from the ordinary case of delay and deviation to save wrecked property. The decision was put upon the ground, that the deviation was in conformity to usage, and that justifies the master equally, as when the deviation results from necessity.

227. "The bearing away," observed Judge Sprague, "upon seeing the signal of the Urania, and before its object was known clearly, was not a deviation. It was no more than a common incident of a voyage which the parties must be presumed to contemplate as likely to occur. But it is insisted, that

[1] The Henry Ewbank, 1 Sum. 400. See also Foster v. Gardner, Am. Jurist, No. 21; The Brig Cora, 2 Wash. C. C. R. 80; 6 East's R. 54; *contra*, La Belle Creole, 1 Peters's Ad. R. 40; The Cato, Id. 64.

[2] 6 Law Rep. 363.

as the crew of the Constitution were not in immediate danger or distress, the delay to take them on board was a deviation. Their ship, an American vessel, had foundered at sea on a voyage to the United States. They had been rescued by the Urania, a Danish brig, bound to Copenhagen. They fell in with the Constellation, an American ship, coming to the United States, where she arrived in thirteen or fourteen days.

228. "That it is the invariable practice to take men on board under such circumstances, is abundantly proved. Indeed to have refused to receive their shipwrecked countrymen, and compel them still to rely on the hospitality of strangers, and be transported to a foreign and distant country, would have been a violation, not merely of the courtesy, but of the humanity of the seas,—as a general rule, *that is not to be deemed a deviation which is within the usage of the seas on such a voyage.* Delays to save wrecked property, are an exception to this rule. Salvage in such case is given only to the insured and those engaged in the service. No part is awarded to the underwriters; and it is reasonable that the insured should not be permitted to become wreckers for their own pecuniary benefit, and at the risk of the insurer."[1]

229. As the master has no right to deviate from

[1] The reader will find in 3 Kent, 312, a very satisfactory statement of the law, with respect to deviation, as it affects the contract of insurance. The same principles are equally applicable to the relation between the shipper and ship-owners. See also Codwise v. Hacker, 1 Caines' R. 526, as to what acts will amount to a justification or waiver of a deviation.

the accustomed route without a legal cause, so for a stronger reason, he has no authority to substitute another voyage in the place of the one agreed upon between his owners and the freighters of the ship. Everything beyond the voyage agreed upon, is out of the scope of his authority as master. As such, he has no power to change that voyage for another.[1]

230. In the case of Keeler v. The Firemen's Ins. Co.,[2] it was said by Cowen, J., that a deviation proper is always relative to the geographic line fixed by the policy. And hence, he said, it was quite difficult to perceive how deviation can be predicated of river navigation in almost any case, and especially under a policy on time, covering all and any adventures to and fro in the whole region of the coasting trade from Albany round to Boston, and thence to Chesapeake Bay, at the pleasure of the owners. He was of opinion, that there was no deviation by the master's pursuing any track within the limits specified by the policy.

231. "But if this" (the policy), it was further observed, "had tied up her course from Albany to

[1] Burgon v. Sharpe, 2 Camp. N. P. R. 529.

[2] 3 Hill's R. 250. See Powell v. The Firemen's Ins. Co., American Law Register (No. 2) 110. In this latter case, it was held by the Kentucky Court of Appeals, that where a steamboat is insured for the navigation of a particular river, as the Mississippi, and not from port to port, the rules as to deviation do not apply; and, therefore, that a loss has been incurred while the boat has been running in an unfrequented, though navigable channel of the river, will not affect the policy. But see Gazzam v. Ohio Ins. Co., Wright's R. 261; Jolly v. Ohio Ins. Co., Ibid. 539, 5 Ohio R. 435.

Georgetown, or Alexandria, she being in the Potomac, crowding sail for her port of destination, though so unskilfully as to go in the wrong channel—one that was never taken before for such a purpose—yet, so long as she kept the general course of the river, she had not, I apprehend, deviated within the sense of the law." But has not the master, in the very inception of his contract with the freighter, agreed to go in the usual course, and so far as river navigation is concerned, in the accustomed channel? and if he fails to do so, is he not performing his contract, whether through ignorance or wilfulness, is immaterial, in a manner different from his undertaking? and if loss or accident occurs, would not the deviation be deemed the proximate cause of it? We apprehend that the legal answer to these queries, must be in the affirmative.[1]

232. If the charter-party, bill of lading, or receipt for the goods, prescribes a particular route, the master must pursue it. Hence, where the owner of a line of vessels engaged in transporting goods from Philadelphia to Baltimore, gave to the shipper the following receipt: "Received on board H.'s line for Baltimore *via* Chesapeake and Delaware Canal, from J. B. (the shipper), one hundred slaughter hides, on deck, which I promise to deliver to J. D., at Baltimore, the dangers of the navigation, fire, leakage

[1] See Dunseth v. Wade, 2 Scammon's R. 289. See also, Herman v. Western Marine & F. Ins. Co., 13 Louis. R. 516; Stewart v. Tenn. M. & F. Ins. Co., 10 Humph. 242, and Natchez Ins. Co. v. Stanton, 2 Smedes & Mar. R. 340, as to the effect upon the policy of insurance of taking vessels in tow. But see the foregoing note.

and breakage excepted, he or they paying freight," &c., it was held, that this was a contract to carry the goods to Baltimore through the canal. It appeared in evidence that the vessel left Philadelphia, and on arriving at the mouth of the canal, the captain was informed that the locks were out of order, and that he could not be allowed to pass through the canal. He then proceeded down the bay and out to sea, with the intention of going round to Baltimore, but in a gale of wind the vessel struck on a shoal, and with the cargo was totally lost.

233. It was held, that these circumstances did not excuse the deviation from the designated route. "When the master discovered the impediments to the prosecution of the voyage, through the route called for in the contract, his duty was plain; he had one of two courses to pursue: to remain in a place of safety at the mouth of the canal, or in some convenient and safe place in the neighborhood, until the obstructions were removed; or he should have returned and informed the owners and shippers of the impracticability of proceeding through the canal. The legal effect of the contract is an engagement to deliver the goods at Baltimore in a reasonable time; and what would be a reasonable time, must be determined under all the circumstances, with a view to the condition of the canal, the season of the year, the state of the weather, and such other matters as might enter into the question."[1]

[1] Hand v. Baynes, 4 Whart. 204. There is a distinction, recognised by the Courts, between implied covenants, by opera-

234. It was further held, that the clause in the receipt, "the dangers of the navigation," did not apply to dangers caused by the canal's being by inevitable accident rendered impassable. Occasional interruptions of trade, arising from breaches in canals, or other accidents, are inconveniences, it was said, but in no sense could be considered as dangers of the navigation, coming within the exception.

235. When the bill of lading stipulates that the goods are to be carried from one port to another, a direct voyage is *prima facie* intended, but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge on the part of the shipper, that such a course is to be pursued. The express terms of a bill of lading in such a case are not contradicted by evidence of the usage.

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tion of law, and express covenants. The latter are taken more strictly. And for the reason that when a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, and is not excused, although prevented by inevitable necessity, because it is said he might have provided against it by his contract. On this ground it has been held, that if a ship be warranted to sail on or before a particular day, but is prevented from sailing on that day by an embargo, the warranty is not complied with. Horn v. Whitmore, 2 Cowp. 784; Parson v. Watson, 2 Id. 785. Whether this doctrine rests upon grounds that approve themselves to reason and justice, whether it would not be more in harmony with both to consider every contract of that nature as excepting impossibilities, and excusing the party if they interposed to prevent the performance of his undertaking, it is now too late to inquire. The authorities are conclusive upon this point. But in the case of implied covenants by operation of law, if the party is disabled to perform them, without any default in him, and hath no remedy over, then the law will excuse him. See 6 T. R. 750; 8 Id. 259.

A presumption of law is controlled by proof of a fact, that is, of the usage.[1]

236. If the ship be destined to several places, the master must sail to them in the order designated, or which may be usual, making such intermediate rests and stages only in the course of his voyage as the ordinary convenience of his employers and the nature of the ship's service may require. If she be driven into a port out of the course of the voyage by tempest, or the master sail thither for any of the before-mentioned reasons, he must wait no longer than necessity requires, but sail again without delay; and for that purpose supply his ship with the requisite necessaries or repairs as expeditiously as he can. While a vessel is detained at a port of necessity, it is no deviation to take in additional cargo, if no additional delay or risk is occasioned thereby.[2] And when a policy of insurance grants liberty to touch at a port, the ship may take in or discharge cargo, without its being considered a deviation, if no delay or change of risk is incurred thereby, and the purpose for which the liberty to touch was granted is kept in view.[3]

237. When the vessel is driven into an intermediate port by stress of weather, and is unable to proceed in her present condition, the master is bound

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[1] Lowry v. Russell, 8 Pick. 360.

[2] Abbott on Shipping, 445; 3 Kent, 314; Chase v. Eagle Ins. Co., 5 Pick. 51; Hughes v. Union Ins. Co., 3 Wheat. 159; Paine v. Col. Ins. Co., 2 John. 264; Bork v. Norton, 2 M'Lean R. 422.

[3] Thorndike v. Boardman, 4 Pick. 471.

to repair her in convenient time, or procure another vessel to carry the goods, as we shall more particularly see hereafter. In the case of Bork v. Norton,[1] it was observed by Judge M'Lean, that it might well be a matter of doubt whether all the principles of maritime contracts, such as we are now considering, could be applied to the navigation of the western lakes and rivers. A distinction, he thought, might well be drawn between a contract for the transportation of goods upon the high seas, and over lakes of but limited extent.

238. In the former case, he said, the risks were numerous, and being well understood, might, to some extent at least, be protected by an insurance. In the latter, if the risks are of the same nature, they are more limited. But the main difference is, the transportation by sea is the only means of conveyance in one case, while, in the other, if obstructions on the water occur by ice or otherwise, a land transportation may be adopted. And the contract is made in reference to this fact, either express or implied.

239. With respect to the first suggested difference, it may be observed, that if the risks by lake navigation are more limited, they are equally well understood as the risks at sea, and can therefore be equally protected by insurance. With respect to the second difference, the conclusion drawn from it does not seem a sound one. When a party agrees to convey goods by water, there are certain known risks to be

[1] 2 M'Lean R. 422.

encountered.[1] These may delay the voyage. The law has prescribed the duties of the master in such a contingency. When the voyage is interrupted, he must wait no longer than necessity requires. But the law has nowhere enumerated it as among his duties, that when the progress of the voyage is delayed by embargo or ice, that he shall change the mode of conveyance, and subject himself to the onerous expense of transporting the goods by land. If the shipper wishes to guard against delay, he can, by a special contract, make it obligatory upon the carrier to forward the goods by land when their progress is interrupted by the accidents of water navigation. Simply because there is a mode of transportation different from the stipulated mode, would seem to be an insufficient reason for the position, that the carrier must avail himself of it upon the happening of a certain event.

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[1] Might not the carrier take upon himself the responsibility of an insurer, by changing the mode of conveyance? Suppose the goods should be lost, after the change from water to land carriage, by inevitable accident or irresistible force, would not the shipper have a right to claim damages, and upon the ground that the carrier by changing the mode of conveyance, had impliedly assumed to be answerable for all losses? Would not that be the legal interpretation of the transaction? At all events, would not such change of conveyance be deemed by the law the proximate cause of any loss or damage that might ensue?

If the shipper unconditionally receives the goods at the port of distress, and conveys them overland to the port of destination, the expense of such conveyance must be borne by him, and he is also bound to pay *pro rata* freight. When the shipper receives the goods, as to him, the voyage is ended; and as to the future, the carrier has neither duty nor reward. Reed v. Dick, 8 Watts' R. 479.

240. If by reason of the damage done to the ship, or through want of necessary materials she cannot be repaired at all, or not without very great loss of time, the master, by the English law, is at liberty to procure another ship to transport the cargo to the place of destination.[1] In this country, says Chancellor Kent,[2] we have followed the doctrine of Emerigon, and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interest of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination. If there be another vessel in the same or in a contiguous port, which can be had, the duty is clear and imperative upon the master to hire it; but still the master is to exercise a sound discretion adapted to the case. He may tranship the cargo, if he has the means, or let it re-

[1] Abbott on Shipping, 446. The English law leaves the master *at liberty* to tranship, as stated in the text. It is not considered, it would seem, to be both his *duty* as well as his right to forward the cargo in another vessel. See Shipton v. Thornton, 9 Adol. & Ellis, 314.

When the privilege of transhipment is reserved to the carrier in the bill of lading, he is not thereby discharged from any responsibility which is incident to his contract until the goods be delivered at their destined port. See Angell on Carriers, 232; and also Whitesides v. Russell, 8 Watts & S. 44; M'Gregor v. Kilgore, 6 Ohio R. 143; Dunseth v. Wade, 2 Scamm. (Ill.), 288; Cassilley v. Young, 4 B. Mon. R. 265; Little v. Semple, 8 Misson. R. 99.

[2] 3 Kent, 212; Emerigon, tome I. 428, 429; Code de Commerce, art. 296; Boulay Paty, Cours de Droit Com., tome II. 400–405.

main. He may bind it for repairs to the ship. He may sell part or hypothecate the whole.[1]

241. If, however, the shipper will not consent to the offer of the master to procure another vessel to carry on the cargo, he is bound to pay full freight. It is his own act that prevents the due fulfilment of the contract.[2] It should be observed, that the duty of the master to procure another vessel is only imperative, when another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, and there can be no difficulties in the way of a safe transhipment.[3]

242. If the master does tranship for the completion of the voyage, the freighter is bound to pay the extra freight, that is, the increased freight arising from the hire of the new ship.[4] Extra freight, in such a case, means the increase of freight beyond what the freight would have been under the original charter-party, if the necessity of hiring another vessel had not intervened. The owner of the goods is not

[1] See also Mumford v. The Com. Ins. Co., 5 John. R. 262; Searle v. Scovill, 4 Johns. Ch. R. 218; Jordan v. Warren Ins. Co., 1 Story's R. 342; Miston v. Lord, Blatch. R. 354.

[2] Molloy, B. 2, c. 4, s. 5; Griswold v. New York Ins. Co., 3 John. 321; Bradhurst v. Col. Ins. Co., 9 Ib. 17; Herbert v. Hallett, 3 John. 693; Schieffelin v. New York Ins. Co., 9 Ib. 21; Willings v. Blight, 2 Peters's Adm. R. 289; 3 Kent, 210; Shipton v. Thornton, 9 Adol. & Ellis, 336.

[3] Salters v. Ocean Ins. Co., 12 John. R. 107; Treadwell v. Union Ins. Co., 6 Cowen, 276; The Gratitudine, 3 Rob. Ad. R. 240; 3 Kent, 213.

[4] Mumford v. Com. Ins. Co., 5 John. 262; Searle v. Scovill, *supra*; Shipton v. Thornton, *supra*.

responsible for the old and the new freight united. The first ship did not earn, upon any principle, more than a rateable proportion of the original freight, because she performed only a part of the voyage; and it might well happen, if the freight up to the port of necessity was accurately and justly apportioned, that the hire of the new ship might not amount to more than the portion of the original freight which remained to be earned by the first ship. To ascertain the amount of such extra freight, the proper rule is, to determine the difference between the amount of freight under the original charter-party, and the rateable freight for the goods saved to the port of necessity, added to the freight of the new ship hired to carry on the goods. This extra freight for the renewed voyage is a lien on the cargo.[1]

243. In New York, and by the French law, which is entitled to great weight upon a maritime question, the insurer upon the goods must pay the increased freight arising from the necessary change of the ship.[2] But in the case of Shultz v. Ohio Ins. Co.,[3] the Court of Appeals of Kentucky held, that the insurer guarantees only the safe arrival of the goods, and is not

[1] Searle v. Scovell, 4 John. Ch. R. 218; Pothier, tit. Charte-partie, n. 67, 68.

[2] Mumford v. The Com. Ins. Co., 5 John. R.; Searle v. Scovell, *supra*; American Ins. Co. v. Center, 4 Wend. 45; Code de Commerce, No. 391, 393; Emerigon, tome I., 429 to 433.

[3] 1 B. Monroe, 336; see, also, Caze v. Balt. Ins. Co., 7 Cranch, 358; Columbian Ins. Co. v. Catlett, 12 Wheat. 383; Baille v. Modigliani, Marsh on Ins. 728; Dodge v. The Union Marine Ins. Co., 17 Mass. R. 475.

liable to the insured for *extra* freight incurred by a transhipment, in case of a disaster insured against. The Court, in this case, went into a very elaborate examination of the American authorities upon the point, and while they could find no case directly militating against the doctrine of the New York cases, they thought the general tenor and bearing of them were inconsistent with it. But it is at all times a dangerous practice to apply the general expressions of Judges, in deciding questions directly before them, to cases where new points have arisen, and new issues are involved. Those general expressions decide nothing. They were employed with reference to one subject, and while the mind was occupied with particular questions. Other questions were excluded from the mental view, and those expressions were used without regard to their effect upon cases that might hereafter arise. Hence it is, that, as a general rule, subject of course to particular exceptions, it is only the actual decision, upon the actual point before a Court, that is entitled to the weight of precedent, or that is legitimately used to explain the exact meaning and doctrine of the Judge.

244. If the master's own ship can be repaired, he is not bound to send the cargo by another, but may detain it till the repairs are made. And he has power and authority over the cargo adequate to the purpose of effecting the repairs, and providing for its safe delivery at the port of destination. It is true, that in the ordinary state of things, the master is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of instant, and

unforeseen, and unprovided for necessity, the character of agent and supercargo is forced upon him by the general policy of the law. And he may therefore bind the cargo for repairs to the ship, when he cannot obtain the necessary funds upon a pledge of the ship itself. He may sell part of the cargo, for the purpose of applying the proceeds to the prosecution of the voyage, or he may hypothecate the whole for the same purpose. If he sells, the law does not fix any aliquot part, though it must be of a part only; and, generally speaking, it must be adequate to the occasion. What is reasonable and just, in respect to the execution of his powers in such cases, is legal.[1]

245. The books are not very definite as to the time allowable to the master to repair and go on with his voyage. Some of the foreign regulations, as was observed by Judge Putnam, in the case of Clark v. Mass. F. & M. Ins. Co.,[2] seem not to be consistent or consonant with reason, experience, or convenience, when applied to the usage of our own country. Thus, for example, according to the laws of the Hanse Towns, three days at most are allowed to the master to repair. By the laws of Oleron,[3] if the master can *readily* repair his vessel, he may do it, or if he pleases, he may freight another ship to perform the voyage. By the laws of Wisbury,[4] it is said that the master may fit out his ship, if he can do it in a *little time*. Molloy remarks, that in such case, the

[1] The Gratitudine, 3 Rob. Ad. R. 240; Abbott on Shipp. 447.
[2] 2 Pick. 108. [3] Art. 4. [4] Art. 16.

master may either mend his ship or freight another.[1] He uses no words of restriction as to the time.

246. From these vague and loose expressions, no rule can be deduced. Our American cases give a wide latitude to the master, and where the cargo is not of a perishable nature, allow him adequate time to make the necessary repairs. "What is to be understood by repairing *readily*, or *speedily*, or *in a little time*, must depend upon the circumstances of the case. Chief Justice Kent, speaking of a ship which was repaired in seventeen days, observed that she was in a condition to be immediately repaired."[2] And in the case from Pickering, cited in the margin, it was held that the master was justified in retaining his cargo and earning his freight, although the ship was so much damaged, that it required two months to repair her. Each case, as it arises, must furnish its own rule.

247. After the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port, short of the port of destination, without payment of the full freight for the voyage, whether the cargo arrive there in a damaged or in an undamaged state. The reason is obvious. The master has a right to carry on the cargo to the port of destination; and if his ship be capable, either then, or within a reasonable time, of carrying the cargo to the port of destination, there is no ground

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[1] Book 2, c. 4, § 5.

[2] Clark v. Mass. F. & M. Ins. Co., *supra;* Griswold v. N. Y. Ins. Co., 3 John. R. 327.

to say, that he is not entitled to earn a full freight; and the shippers of the cargo cannot insist upon changing the original contract *in invitum*, and cut him off from all freight, or dismiss him with a *pro rata* freight.[1]

248. If the master at the port of necessity refuses either to tranship the cargo, or carry it on in his own ship within a reasonable time, he is entitled to no freight. Freight is dependent upon the due performance of his contract, and if he declines or refuses to perform it, his claim to freight is destroyed.[2]

249. If the cargo is of a perishable nature, and there is no time or opportunity to consult the merchant, the master is bound to tranship or sell it, according as the one or the other will be most beneficial to the merchant. He is the agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of a sound discretion, are binding upon all parties in interest.[3]

250. But when the cargo is so much damaged that to proceed with the voyage will endanger the safety of the ship or cargo, or render it worthless, it is the duty of the master to land and sell it at

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[1] Jordan v. Warren Ins. Co., 1 Story's C. C. R. 342.

[2] Amroyd v. Union Ins. Co., 3 Binn. 437; Coffin v. Storer, 5 Mass. 242; Treadwell v. Union Ins. Co., 6 Cowen, 270; Mumford v. Com. Ins. Co., 5 John. 262; The Ann D. Richardson, Blatchford's R. 358, note; Miston v. Lord, Ibid. 354.

[3] Abbott on Shipping, p. 447; The Gratitudine, 3 Rob. Ad. R. 240; The Isabella, 4 Id. 77; Miston v. Lord, *supra*.

the port of necessity, whether this be the original port of the shipment to which the ship returns, or at any intermediate port, at which the ship arrives in the course of the voyage. And this he is bound to do, in the absence of instructions from the shipper, even though the cargo may be in a condition to be carried *in specie* to the port of destination and there landed.[1]

251. If there is no acceptance of the cargo, or waiver of performance by the shipper, or his agent, at the port of distress, the owner of the vessel is not entitled to freight, notwithstanding the damaged state of the cargo justified its sale by the master at such port of distress.[2] The voluntary acceptance of the cargo by the shipper, will of course have the effect to charge him with a rateable portion of the freight.[3]

252. But there is no authority for subjecting him to freight, where the port of distress and of acceptance of the cargo, is the port of shipment, and when no part of the voyage has been performed. Hence, where A., by his agents, chartered a vessel for a voyage from New York to Havre, the freight to be payable on the arrival and discharge of the cargo at Havre, and the vessel sailed, but encoun-

[1] Miston v. Lord, *supra;* Jordan v. Warren Ins. Co., 1 Story's C. C. R. 342; *contra*, Halwerson v. Cole, 1 Spears, 324.

[2] The Ann D. Richardson; Halwerson v. Cole, 1 Spears' R. (S. C.) 321; 7 Cranch's R. 362; Blatchford's R. 358, note; post tit. Freight.

[3] Miston v. Lord, *supra*.

tered a storm and sprang aleak, and put back to New York: in consequence, the cargo was discharged, and on a survey, was found to be so much damaged by salt water, that it would not bear transportation, nor would its shipment have been safe for the vessel or crew. A.'s agents refused to interfere with it, and the master sold it at auction. In an action by A. for the net proceeds, it was held, that the owner of the vessel was not entitled to retain anything for freight.[1]

253. "What seems decisive of this case," said his honor, Judge Nelson, "and of the class of cases to which it belongs, is, that admitting the master to be the agent at the port of distress of all parties interested, and that he has acted *bona fide*, and for the benefit of all concerned, in the sale of the damaged cargo, yet, inasmuch as the goods were in a condition that would endanger the safety of the ship and the lives of the crew if they were carried forward, it cannot be said that the voyage was broken up for the benefit of the cargo any more than for the benefit of the ship-owners. Independently of any duty but that the master owed to the cargo under the existing calamity, the interest of his owners dictated the breaking up of the voyage; and it being broken up under those circumstances, and for that cause, and the shipper having derived no benefit under his contract, it is difficult to find any principle, legal or equitable, that would subject him to any part of the freight."

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[1] Miston v. Lord, *supra*.

254. The duty of the master to tranship or sell the cargo, according to the circumstances of the case, is equally imperative in a case where the ship has been wrecked, and the cargo saved. And if on the high seas, the ship be in imminent danger of sinking, and another ship, apparently of sufficient ability, be passing by, the master may remove the cargo into such ship, and although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss.[1]

255. So too in the case of a charter-party, where the vessel is let for a voyage, and is sufficient at the commencement of it, but is entirely lost, or incapable of pursuing it, the hirer is entitled to betake himself to another vessel, and the owner loses his freight upon the charter-party. The charterer, however, must not abandon the vessel whilst she can be properly kept afloat and used for the purposes of the voyage; and if repairs are necessary, he may make them at the charge of the owner.[2]

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[1] Abbott on Shipping, p. 448.

[2] Kimball v. Tucker, 10 Mass. R. 192. See this case, as to whether freight runs during the repairs. "The disposal of the cargo by the master," says Lord Tenterden, "is a matter that requires the utmost caution on his part. He should always bear in mind that it is his duty to convey it to the place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty, is an act for which both he and his owners may be made responsible; and the law of England does not recognise the authority of any tribunal or officer acting upon his suggestion, or at his instance; but will scrutinize their acts as his own. The hypothecation of the cargo is allowed by the marine

256. In the case of shipwreck, the master is not at liberty to sell the cargo merely on the ground that the sale will be the best thing for all concerned, and that a prudent owner, if present, would sell under the same circumstances; but he will be justified in selling only by a legal necessity. Hence, in the case of Bryant v. Com. Ins. Co.,[1] where a vessel was

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law, and by the law of England also; but it is allowed in those cases only in which it is made in furtherance of this purpose. The sale of a part has been allowed; but it was allowed in a case in which the hypothecation of the whole would have been lawful, and because it was considered as a matter equivalent to such hypothecation. Hypothecation imports a pledge without immediate change of possession: it gives a right to the party who makes advances upon the faith of it, to have the possession, if his advances are not repaid at the stipulated time, but it leaves to the proprietor of the things that may be hypothecated, the power of making such repayment, and thereby freeing them from the obligation. It is, therefore, contrary to the nature of this proceeding, and consequently contrary to the duty and beyond the power of the master to engage that the lender shall at all events have the goods delivered at their place of destination to him or his agents, to be there sold and disposed of by him or them, without reserving the right of redemption to the merchant; and such an engagement will not be obligatory upon the merchant, but he will still have the right to take his goods upon payment of the money for which they may have been engaged." Abbott on Shipping, pp. 448, 449.

[1] 13 Pick. 543. "It would be clear," said Putnam, J., "that if the master assumed to act for the owners and underwriters when they were present, or so near as to be consulted in regard to the disposition of the property, his acts under such assumption of authority would not bind them. He might be justified, if the necessity were so urgent as to require immediate action; as if the goods would probably perish or be destroyed before the directions of the owners could be obtained. But if the goods were not perishable or damaged, and might be preserved in reasonable safety until the owners and underwriters could be consulted, he should

stranded on the coast of Virginia, and the cargo was landed without damage, and was not of a perishable nature, and might have been kept in reasonable safety until the owners and insurers, who lived in Massachusetts, could be heard from, it was held, that the master had no authority to sell the cargo and break up the voyage, without waiting until the owners and insurers could be consulted.

257. If the master is unable to deliver the cargo

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preserve and guard them; and in such case he would have no more authority to break up the voyage and sell the cargo, than the mate or a stranger would have. And notwithstanding he conducted himself honestly, yet if the other elements which make up this legal necessity were wanting, the owners and underwriters would not be bound. The question therefore is, whether or not there was a legal necessity for the master to terminate the voyage and sell the cargo. The acting merely in good faith, and for the interest of all concerned, will not exempt the sale of goods from the character of a tortious conversion, for which the ship-owner and purchaser are responsible." See also 3 Kent, 134; Schieffelin v. N. York Ins. Co., 9 John. 21; Searle v. Scovell, 4 John. Ch. 218; Saltus v. Ocean Ins. Co., Id. 107; American Ins. Co. v. Centre, 4 Wend. 52; Freeman v. East India Co., 4 Barn. & Ald. 617; Halwerson v. Cole, 1 Spears (S. C.), 321. In this latter case it was said by Evans, J., *per curia*, that "cases might arise in which there may exist a necessity for disposing of a damaged cargo. If it be for the general benefit, it may be a subject of general average. But in all other cases, the shipper has a right to insist on a delivery of the goods as a condition precedent to the payment of freight. It is no answer to say the ship-owner acted *bona fide*, and the sale was for his benefit. He has commissioned no one to judge for him on that subject. He may prefer to have the goods in a damaged state. It is his right, and cannot be withheld from him without a forfeiture of the demand for freight. The opinion of this Court is, that the Circuit decision was right; and the motion is dismissed." See also Poole v. The Protection Ins. Co., 14 Com. 47.

at the port of destination from the disasters of the voyage, that is, if the ship is disabled, and another cannot be procured at the port of necessity, or at a contiguous port, if the cargo is perishable, it would seem to be, from the very nature of the case, the proper course to sell it. If, on the other hand, it is not perishable, the master must store it, and inform the shipper as soon as possible.[1] And he is not jus-

[1] Saltus v. Ocean Ins. Co., 12 John. 107; Treadwell v. Union Ins. Co., 6 Cowen, 270; Poole v. Protection Ins. Co., *ubi sup.*; Jordan v. Warren Ins. Co., 1 Story's R. 342. The observations upon this subject, of Lord Tenterden, are deserving of attention. "What, then," he inquires, "is the master to do, if by any disaster happening in the course of the voyage, he is unable to carry the goods to the place of destination, or to deliver them there? To this, as a general question, I apprehend no answer can be given. Every case must depend upon its own peculiar circumstances. The conduct proper to be adopted with respect to perishable goods, will be improper with respect to a cargo not perishable. One thing may be fit to be done with fish or fruit, and another with timber or iron; one method may be proper in distant regions, another in the vicinity of the merchant; one in a frequented navigation, another on unfrequented shores. The wreck of the ship is not necessarily followed by an impossibility of sending forward the goods; and does not of itself make their sale a measure of necessity or expedience: much less can the loss of the season, or of the proper course of the voyage, have this effect. An unexpected interdiction of commerce, or a sudden war, may defeat the adventure, and oblige the ship to stop on her course; but neither of these events doth of itself alone make it necessary to sell the cargo at the place to which it may be proper for the ship to resort. In these and many other cases, the master may be discharged of his obligation to deliver the cargo at the place of destination, but it does not therefore follow that he is authorized to sell it, or ought to do so. What then is he to do? In general, it may be said, he is to do that which a wise and prudent man will think most conducive to the benefit of all concerned. In so doing, he may expect to be safe, because the merchant will not have reason to be dissatisfied; but what this thing will be no

tified in selling the cargo at the port of necessity, by showing that he acted in good faith and under the advice of surveyors called by him, who reported it damaged, and recommended a sale for the benefit of all concerned, provided that no necessity existed for a sale. The master has no right to sell the cargo, or any portion thereof, unless in a case of moral necessity, in order to prevent a greater loss to the shippers. If such necessity is not made to appear,

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general rules can teach. Some regard may be allowed to the interest of the ship and of its owners, but the interest of the cargo must not be sacrificed to it. Transhipment, for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original purpose; if that be impracticable, return or a safe deposit may be expedient. The merchant should be consulted, if possible. A sale is the last thing that the master should think of, because it can only be justified by that necessity which supersedes all human laws. If he sell without necessity, his owners, as well as himself will be answerable to the merchant, and they will be answerable if he places the goods at the disposal of a vice-admiralty Court in a British colony, and they are sold under an order of the Court, such a Court having no authority to order a sale. And the persons who buy under such circumstances, will not acquire a title as against the merchant, but must answer to him for the value of the goods." Abbott on Shipping, pp. 449–451. See also 3 Kent, 224; Palmer v. Lorillard, 16 John. 348; Everett v. Saltus, 15 Wend. 474; Caneran v. Meaburn, 1 Bing. R. 243; Robertson v. Clark, Id. 445; Smith v. Martin, 6 Binn. R. 262; Scull v. Biddle, 2 Wash. C. C. R. 150; Dodge v. Union Ins. Co., 17 Mass. R. 478; Whitney v. Firemen's Ins. Co., 18 John. R. 208; Myers v. The Harriet, Adm. E. D. P. July, 1848; 2 Wharton's Dig. 662; Stevens & Ben. on Av. 285; 2 Story's R. 471; 13 Peters, 387; 2 Pick. 249; 3 Sum. 27; Edw. Ad. 118. These latter cases as to the materiality of the *bonâ fide* action of the master, in making the sale. Pope v. Nickerson, 3 Story's C. C. R. 465; Lawrence v. The New Bedford Com. Ins. Co., 2 Story's R. 471.

the advice of surveyors is no justification, and he and his owners are answerable to the merchant.[1]

258. Whilst the general rule is, as we have seen, that the master must stow the cargo, and immediately inform the shipper, where it is sound, and in no danger of precipitate decay, it is proper to observe, that the rule is not absolutely inflexible. Circumstances may arise, which would amount to a moral necessity, and render it the duty of the master to sell the cargo, which he has no means of forwarding to the port of destination. The port of necessity may be at such a distance from the port of shipment, the means of communication so difficult and irregular, and the cargo of such a nature, that the market for it might be lost, before the shipper could interfere. In such a case the master would be bound to sell, to prevent a greater loss to the owner.[2]

259. In the case of Lawrence v. The New Bedford Com. Ins. Co.,[3] it was held, that when a ship is abandoned for a total loss, the master cannot sell the cargo, and invest the proceeds in other goods, unless he be justified by necessity, or by a high degree of expediency. And this expediency must be judged

[1] Myers v. Baymore, 10 Barr, R. 114; Pope v. Nickerson, *supra;* Gordon v. Mass. Ins. Co., 2 Pick. 249; Smith v. Martin, 6 Binn. 262; 5 Peters' R. 621; 12 Pick. 279; 1 Bing. 243.

[2] Pope v. Nickerson, *supra;* The Gratitudine, 3 Rob. 240, 259, 261; Morris v. Robinson, 3 B. & C. 196; Hunter v. Parker, 7 M. & Wil. 340, 342; Bryant v. Com. Ins. Co., 6 Pick. 131. It was held, in this latter case, that a usage for the master of a vessel stranded, to sell the cargo without necessity, is void.

[3] Story's R. 471.

of with reference to the voyage and the nature of the property. If the sale cannot be justified upon these grounds, it will be treated as a mere tortious conversion.

260. If, however, in such a case, the master does make a sale, without such necessity or high expediency, and it turns out to be advantageous to the parties interested, and they adopt the acts of the master, and receive the property without reserve or objection, that will amount to a ratification, and they must then take the property or its proceeds *cum onere*. But if they receive the property, or its proceeds, reserving all their rights, and waiving no objections, then they are entitled to receive the proceeds, without any charges, if the proceeds do not yield a profit to them beyond the fair value of the property shipped, and so improperly converted, as it would have been on its arrival at the original port of destination. But if it does yield such a profit, and the master acted without fraud, he is entitled to be paid a reasonable compensation and his reasonable expenses, not exceeding such profit.[1]

260 a. It must be understood, that while the owners of the vessel are generally responsible for the misconduct of the master committed in their business, to third persons, or strangers, they are not so responsible to their *cestuis que trust*, or co-partners, or joint shareholders, provided they use due care in selecting him.[2]

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[1] Story's R. 471.

[2] Joy v. Allen, 2 W. & M. 303.

261. The master is bound to take all possible care of the cargo, during the progress of the voyage. If the ship is stranded, the duties and liabilities of the owners and master, as common carriers, are not varied by that event, but continue the same as before. They are bound to show that no human diligence or skill could save the property from being lost by the shipwreck, but that it perished with the wreck.[1] After the damage to the goods is esta-

[1] King v. Sheppard, 7 Law R. 275; S. C. 3 Story's R. 349; Abbott on Shipping, 454. See also, Poole v. Protection Ins. Co., 14 Conn. 47; Davidson v. Gywnne, 12 East. 381. King v. Sheppard, *supra*, was a case of the loss of a box of specie, containing ten thousand dollars in gold, shipped in the autumn of 1842, at New York, on board the ship North America, Hall, master, for Mobile. The ship struck on the Bahama Banks, and knocked off her rudder, in consequence of which she became unmanageable. The master, who had hitherto kept the gold, together with another box containing $1000 in silver, in his state room, now ordered his mates to remove it to the run, which he deemed a safer place, as the crew would necessarily be in the cabin for the purpose of fitting a temporary rudder. This was accordingly done, and the boxes stowed in the run, covered with some boxes of powder, &c. The run was not separated from the main hold. The ship went on shore again, in the course of two or three days, on the Florida Reef, where, after lying several days, during which attempts were made to get her off, she bilged about ten o'clock in the evening. The wreckers were now admitted on board to save the cargo, some forty or fifty of whom went immediately into the hold and commenced breaking out. The second mate was put into the run to look after the specie, but did not get down until the wreckers had been there fifteen or twenty minutes. There was then two feet of water where the specie had been deposited. The second mate stood over the place a large part of an hour, and when the captains of the wreckers came for the gold, pointed out to them where he had placed it. Search was made and the silver found, but not the gold, which has never been heard of since. Search was made

blished, the *onus probandi* lies upon the carrier to show that it was occasioned by one of the perils from which he was exempted by the bill of lading. But even if the carrier does show that the particular loss or damage arose from the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of

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for it through the ship, and one of the wrecking vessels alongside. No embezzlement or fraud was shown on the part of the master. The part of the cargo saved was carried to Key West and libelled for salvage. The ship was a total loss. This action was brought against the owners of the ship to recover the value of the gold.

It was contended for the respondents, that as the gold was in all probability stolen by the wreckers in the confusion of the night, they were excused by the exception in their bill of lading of the perils of the seas. That this loss was a peril of the sea, within the meaning of the law, as it was the direct consequence of such peril, and happened while the ship and cargo were all lost, except as they might be saved by those casually in the neighborhood. That if the captain acted *bona fide*, and placed the gold in the run, believing it the safest place, negligence could not be imputed to him.

For the libellants, it was contended, on the other hand, that the owners were liable as common carriers, notwithstanding the happening of the peril, if the loss was not the immediate and necessary consequence, and that in this case it was to be attributed to gross negligence on the part of the master.

Judge Story decided the case in accordance with the principles stated in the text. He held, that the wreckers were persons acting in the employ of the master, and not piratically; and that the master in this case did not exercise proper care and diligence in regard to the property, but on the contrary, was guilty of great negligence. He ordered a decree to be entered for the libellants, for the amount of the gold, with interest from the time when proceedings for salvage were instituted at Key West.

the goods; for then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. True, it occurs directly by a peril of the sea, but it might have been avoided by skill and diligence at the time, and, therefore, the carrier is liable.[1]

262. If the nature of the cargo is such that it requires to be ventilated, the master must see that it is done. If the goods are damaged or destroyed by rats during the voyage, the carrier and not the insurer is responsible, even though there were cats on board. Such damage or destruction is not within the usual exceptions in the bill of lading, and the carrier is not exonerated. But if the rats make a hole in the ship, through which water comes in and damages the cargo, and no negligence attaches to the master, the insurer, and not the carrier, is responsible. It is the result of a peril within the policy.[2]

[1] Clark v. Barnwell, 12 How. U. S. R. 273; Muddle v. Stride, 9 Car. & P. 380.

[2] Lavaroni v. Drury, American Law Register, No. iii., p. 174; Garrigues v. Coxe, 1 Binn. R. 592; Dale v. Hall, 1 Wils. 281. The foreign authorities all concur in holding the master exempt, if he keeps cats. Emerigon, vol. i., pp. 375, 376; Consulato del Mare, cc. 65, 66; Roccus, de Navibus, note, 58. But in the recent case of Lavaroni v. Drury, *supra*, where goods were put on board a ship to be carried by sea, for hire, under a bill of lading, containing the usual exception of, "the act of God, the Queen's enemies, fire and all other dangers and accidents of the seas, rivers and navigation, &c., excepted," were damaged by rats during the voyage, it was held to be no defence to an action by the owner of the goods, that the master had kept cats on board. Pollock, C. B., however, after pronouncing the judgment of the Court of Exchequer, ob-

This distinction may not rest upon grounds that are entirely satisfactory, or perhaps consistent. In both cases, the loss or damage proceeds from the rats. In the one case, the injury is done by them directly; in the other indirectly,—that is, by a leak which they caused. If, however, the rule, which obtains in the law of insurance, *causa proxima, non remota spectatur*, is equally applicable to the law of carriers, the apparent difficulty involved in this distinction is disposed of. At all events, it reconciles the otherwise conflicting doctrines of the adjudged cases.

263. The carrier is held responsible for damage

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served, that if rats had made a hole in the ship through which water came in and damaged the cargo, it might very likely be a case of sea damage. The judgment of the Court did not touch that question.

This question, with respect to damage caused by rats, has been treated with great gravity, by great Judges, and seems to be deemed by all writers upon the law of carriers, as a subject well worthy the investigation of all liberal and enlightened minds. "It seems," says Judge Story, Story on Bailments, s. 513, "that a loss occasioned by a leakage, which is caused by rats gnawing a hole in the bottom of the vessel, is not in the English law deemed a loss by a peril of the sea, or by inevitable casualty. But if the master has used all reasonable precautions to prevent such a loss, *as by having a cat on board*, it is, by the general consent of the writers upon the foreign maritime law, held to be a loss by a peril of the sea or inevitable accident." See also, Curtis's Merchant Seamen, 197, 216, 219; Abbott on Shipping, 454, 455; Angell on Carriers, 168–171; 3 Kent, 300, 301; Aymer v. Astor, 6 Cowen, R. 266; Hunter v. Potts, 4 Camp. N. P. 203; Ewart v. Street, 2 Bail. (S. C.) R. 161. In this case, it was said by Harper, J., that "in all cases of injury to vessels from the gnawing of rats, the injury originates from causes that may be foreseen, or from the agency of man."

ensuing from the destruction of a ship's bottom by worms in the course of the voyage. Such damage is not deemed to have arisen from a peril of the sea, but from the ordinary wear and decay of the vessel. And the masters and owners are responsible for every injury that might have been prevented by human foresight or care.[1]

264. The master and owners are liable for goods stolen or embezzled on board the ship by the crew or any other persons, although no negligence or fraud may be imputable to them. As we have elsewhere observed, the rigor of the law in this respect arises from reasons of public policy, and to prevent the combinations that might be made with thieves and robbers. In such case, the carrier must answer for the value of the missing goods, according to the clear net value of the goods of the like kind and quality, at the port of delivery. Whether he is also to pay interest from the time when the goods ought to have been delivered, de-

[1] Story on Bailments, s. 513; Park. Ins., ch. 3; Rohl v. Parr, 1 Esp. R. 444; Martin v. Salem Ins. Co., 2 Mass. R. 429; Copeland v. The N. E. Marine Ins. Co., 2 Met. R. 432; Hazard v. N. E. Ins. Co., 1 Sum. R. 218; S. C., 8 Peters' R. 557; Abbott on Shipping, 455; Joy v. Allen, 2 W. & M. 303. In the case of Depeyster v. Columbian Ins. Co., 2 Caines' R. 85, 90, Livingston, J., in delivering the opinion of the Court, said, "I do not, by anything that has been said, mean to be understood as subscribing to the nisi prius opinion of Lord Kenyon, which was cited from 1 Esp. Rep. 444, 'that if a ship's bottom, during a voyage, be eaten by worms, so that she be incapable of proceeding, and be condemned, this is not a loss within the policy.' It is not necessary to decide the question now." The doctrine, however, seems well settled both in England and this country.

pends on the circumstances of the case; but if no fraud or misconduct is imputable to the master, interest will not be allowed.[1]

265. If the cargo is injured by a leak in the vessel, which is not occasioned by perils of the seas, but from sailing in fair weather against a rock, or shallow, known to expert mariners, or if the goods are lost or injured from being stowed in a part of the vessel where the master is not authorized to stow them, the owner will be responsible.[2] In the case of Proprietors of the Trent & Mersey Navigation v. Wood,[3] when, in a voyage from Hull to Gainsborough, a vessel was sunk in the river Trent by striking against the anchor of another, which anchor lay under water, and without a buoy, whereby some goods in the former were injured, the owners thereof were held responsible for the injury.

266. It is universally admitted, as we have elsewhere observed, that in a case of necessity, when the repairs of the ship, or other expense, necessary to enable the master to prosecute the voyage and deliver the cargo at the port of destination, cannot be otherwise obtained, the master, in the exercise of

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[1] Schieffelin v. Harvey, 6 John. R. 170; Watkinson v. Laughton, 8 John. R. 213; Roccus, note 40. It is not such embezzlement as will forfeit a mariner's wages, if he sells part of the cargo, by the direction of the mate, during the permanent absence of the master, in order to procure necessary provisions for the vessel. The Sloop Solon, Crabbe's R. 17.

[2] Curtis's Merchant Seamen, 198; Morse v. Slue, 1 Vent. R. 238; Roccus, note 55; Emerigon, tom. 1, p. 373; The Rebecca, Ware's R. 188; Abbott on Shipp. 455.

[3] Cited in Abbott, p. 455.

a sound discretion, may either hypothecate the whole cargo or sell a part for the accomplishment of the voyage. But if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master can neither sell nor hypothecate; but though the prospect of benefit may be more direct and immediate to the ship, it may still be for the preservation and conveyance of the cargo; and when it is so, it is justly to be considered as done for the common benefit of both ship and cargo.[1]

267. When such sale is made, that is, of part of the cargo to pay for repairs, the ship-owners become indebted for the sum so applied, and the owners of the cargo have also a lien upon the vessel. The claim upon the owners is a personal claim *pro tanto*, with the auxiliary security of the lien on the ship and freight. This personal liability, and this lien

[1] Abbott on Shipp. 455; Ross v. Ship Active, 2 Wash. C. C. R. 226; Joy v. Allen, 2 W. & M. 303; The Gratitudine, 3 Rob. Ad. R. 240; The Ship Packet, 3 Mason, 255; The Zephyr, 3 Mason, 341; United Ins. Co. v. Scott, 1 John. 106; Fontaine v. Col. Ins. Co., 9 John. 29; Amer. Ins. Co. v. Corter, 3 Paige, 323; Searle v. Scoville, 4 John. Ch. 222; Pope v. Nickerson, 3 Story's C. C. R. When a part of the cargo is sold, says Lord Tenterden, Abb. on Shipp., *supra*, if the ship reach the place of destination, the merchant will be entitled to receive the clear value for which the goods might have been sold at that place; or he may take the sum for which the goods actually sold, and if he is content to do so, he may deduct that sum from the money payable for the freight of his other goods; and this, although the owner may have assigned the freight to a third person, and the goods were sold without an urgent necessity." See also, Campbell v. Thompson, 1 Stark. 490; Myers v. Baymore, 10 Barr's R. 114.

attach to the owners and the thing, *eo instanti*, when the appropriation is made, and from that moment the obligation becomes positive and unequivocal.[1] Upon the question whether the liability of the owners *in personam* is absolute, or is affected with the future fate of the ship on the voyage, there has been promulgated a variety of doctrines and opinions.

268. The better opinion, however, is, that if the ship, relieved at the expense of the goods pledged or sold, should afterwards perish, with the residue of the cargo on board, before arrival at the port of destination, the owner is not entitled to payment for the goods sold. The merchant is not placed in a worse situation by the sale of the goods, than if they had remained on board the ship.[2]

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[1] Pope v. Nickerson, 3 Story's C. C. R. 465; Emerigon, Des Contrats a la Grosse, ch. 4, s. 9, p. 445; Valin, Comm., tom. 1, liv. 2, tit. 8, art. 2, p. 568, 569; Pothier, Contrats Marit. n. 34, n. 72.

[2] 3 Kent, 212, 213; Abbott on Shipp. 456; Consolato del Mare, ch. 105; Laws of Oleron, art. 25; Ordinance of Antwerp, art. 19; Emerigon, *supra*, 446; Boulay Paty Droit Comm., tom. 1, tit. 3, p. 268 to 299. But *contra*, Pothier, *supra*, n. 34, n. 72; Valin, *supra*, p. 568, 569; Ordinance of Wisbury, tit. 2, art. 2; Kuricke, Jus. Mar. Hanseati, tit. 6, art. 21; Cleirac. Ordin. d'Oleron, art. 22, p. 88, n. 2; Pope v. Nickerson, *supra*. "It seems to me," says Judge Story, "upon principle, with reference to our law, that the opinions of Valin and Pothier, are entitled to very great weight. As has been already suggested, the limitations of the responsibility of the owners of the ship, are mere qualifications of the antecedent rule of our law, and do not change the nature of the rule. The owners are, and ought to be held personally bound to pay all the lawful contracts of the master, to the full amount thereof, not exceeding their interest in

269. The shippers, it must be understood, are not confined to their remedy against the ship-owners, but they have a right of contribution over against the other owners of the cargo. "Whether this right of contribution would entitle the party to the full benefit of having it deemed a general average for all purposes, or whether the loss by such a sale would be recoverable under a common policy of insurance, are questions with which I do not meddle, and which may depend upon other principles. But I confess myself strongly inclined to the opinion of Lord Stowell; and sitting in the Admiralty, with the whole property under the jurisdiction of the Court, I should, upon an application by the party, deem his right of contribution good against the other shippers, and not turn him round to a remedy exclusively against the owner of the ship, even supposing the latter might, under the circumstances, be made ultimately liable for the payment."[1]

270. If damage be done by a peril insured against, or within the exceptions of the bill of lading, but the master neglects to repair that damage, and in consequence of the want of such repairs the vessel is lost, or the goods injured or destroyed, the neglect to make repairs, and not the sea damage, is treated

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the ship and freight. And when there are various claims, which have occurred at different times, the just principle would seem to be found in the maxim, *Qui prior est in tempore potior est in jure*. In other words, the earliest creditor has a priority or privilege over the others for his prior debt." See Joy v. Allen, 2 W. & M. 303.

[1] The Ship Packet, 3 Mason's R. 255, 261; The Gratitudine, 3 Rob. 240, 264; The Hoffnung, 6 Rob. 383; Emerigon on *Marit.* Loans, c. 4, s. 9; c. 12, s. 4.

as the proximate cause of the loss. The insurers are discharged, but the carrier is liable to the shippers, and upon the ground of his neglect to make the requisite repairs.[1]

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[1] The General Mutual Ins. Co. v. Sherwood, Law Rep. for April '53, p. 673. In this case it was held, in opposition to Hall v. Washington Ins. Co., 2 Story, 176, that, under a marine policy insuring against the usual perils, including barratry, the underwriters are not liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured. The Supreme Court did not intend to overrule by this decision, their decision in the previous case of Peters v. Warren Ins. Co., 14 Peters' R. 99. The loss in that case was the result of *accident*, the collision not being occasioned by the fault or carelessness of either side, and, therefore, a loss by the perils of the sea, within the protection of the policy of insurance. But in this case, the damage to the other vessel was the result of the *negligence* of the master and mariners of the insured vessel. And in law, this being the proximate cause of the loss, the insurers are not liable. They were liable, however, for the damage to the insured vessel, but not to the other. See Pothier, Traite d'Assurance, No. 49, 50; Boucher, 1500, 1502; De Vaux v. Salvador, 4 Ad. & El., 420; Marshall on Ins., 495; 1 Phil. on Ins., 636; 2 Arnould on Ins. 775. See also Robinson v. Jones, 8 Mass. 536, where condemnation of a neutral vessel was caused by resistance of search, and the insurers discharged in consequence. Id. 308.

## CHAPTER XI.

### OF THE DELIVERY OF THE GOODS AT THE PORT OF DESTINATION.

271. Among the obligations which common carriers take upon themselves, as resulting from the nature of their employment, is that of delivering the goods, when they are transported to the place of destination, to the proper person. If they are delivered to a wrong person, and any loss or damage ensues in consequence, they are responsible to the owner.[1] If, however, there is a misdelivery and loss, from the neglect or fault of the shipper, without any fault or neglect of the carrier, the former has no claim upon the latter. Thus, when from the neglect of the shipper to properly mark his goods, and present them to the carrier or his servants for entry in their books, there was a misdelivery and consequent loss, the shipper was held to have no claim upon the carrier.[2]

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[1] The Huntress, Davies' R. 83; Golden v. Manning, 3 Wilson 429; Garnett v. Willan, 5 Barnwell & Alder. 52.

[2] The Huntress, *supra*. "It is the appropriate duty of the mate," observed Judge Ware, in this case, "to superintend the loading and unloading of the goods taken on freight. It is true, that if a dispute arises between different persons claiming the same goods, the proper person to decide this dispute is the clerk, because he takes the account of the goods. But if the mate volun-

272. After safely mooring or anchoring the ship, the master must report her, together with the crew, and deliver his manifest and other papers, and do whatever else is required to be done by the law or custom of the place.[1] If the goods are consigned to the master for sale and returns, he delivers them as master, and receives them as consignee. He must use due diligence in disposing of them, and is accountable for his conduct as consignee to the shipper. If he has orders to dispose of them at the port of destination for the most he can obtain, but he is unable to find a purchaser, he is justified in leaving them in the hands of a merchant in good credit, to be sold for the owner.[2]

273. If he is not the consignee, and the goods are not intrusted to him to dispose of, he is bound to deliver them without delay to the merchant or consignee at the port of destination, upon production of

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teers to decide the dispute, and delivers them to a wrong person, the most that can be said is, that he is acting beyond the line of his proper duty, and may be answerable to his employers; but they are responsible to the owner, for they are as much responsible for the acts of their servants as for their own." See also Conner v. Levering, 2 Cranch. C. C. R. 163. If the master lands the goods at a wrong place, the expense of reloading must be borne by the ship-owner. Weston v. Minot, 3 W. & M. 436.

[1] Abbott on Shipping, 457.

[2] The Waldo, Davies' R. 161; Williams v. Nichols, 13 Wend. 58; Cooke v. Com. Ins. Co., 11 John. R. 40; U. Ins. Co. v. Scott, 1 Id. 111; Kemp v. Caughty, 11 Id. 107; Day v. Noble, 2 Pick. 615; 2 Livermore, 215. Upon the delivery of the goods, the master's authority as master ceases, and consequently the liability of the ship-owners. See also Kendrick v. Delafield, 2 Caines' R. 72.

the bills of lading and payment of the freight, and other charges due in respect to them.[1] By the well-settled course and usage of trade, delivery of goods on freight at the dock, with notice to the consignee

[1] Abbott on Shipping, 459, 460; Bishop v. Ware, 3 Camp. R. 360; Syeds v. Hay, 4 T. R. 260. The former of these cases, was an action on the case for not delivering goods according to a bill of lading—with a count in trover. The plaintiff shipped at Hull, on board a vessel belonging to the defendant, a package of files, to be carried to London. The bill of lading was in the usual form, stating that the goods were to be delivered on payment of freight. When the vessel had arrived and was moored off Custom-house Quay, the plaintiffs sent a barge for their goods, which they required to be put over the ship's side into the barge, at the same time tendering the freight. The captain insisted upon his right to wharfage as well as freight, and refused to deliver up the goods till the wharfage was paid.

It was then proved, by way of defence to the action, that when goods are put over the ship's side, after she is moored at the wharf, half wharfage is usually paid by the consignee—which was contended to be a reasonable demand, as the goods derive a benefit from the ship being moored at the wharf, although they are not actually landed there.

Sir James Mansfield.—"If the goods are not landed, a compensation must be made for the benefit derived from the wharf by the owner of the ship. The goods cannot be subjected to this charge more than to many others which are incurred by the ship in the course of the voyage. According to the bill of lading, the goods in question were to be delivered on payment of freight. The defendant, therefore, could have no right to detain them for wharfage." The plaintiff, accordingly, had a verdict.

In the latter case (Syeds v. Hay, *supra*), it was held, that if the consignee require to have the goods delivered to himself, and direct the master not to land them at a wharf at London, the master must obey the request; for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it. See Hand v. Baynes, 4 Whart. 204, 210.

of the time and place, discharges the ship-owner or common carrier from liability, and the rule applies equally to the coasting and the foreign trade. But uniform usage will control and regulate the mode of delivery, and an exception to the general rule exists, if a reasonable discretion is not exercised by the carrier, and perishable goods are put on the dock in hazardous or improper weather, against the consent of the consignee.[1]

274. The consignee of a vessel has authority to arrange with the owner or consignee of her cargo in respect to the time and manner of its delivery, and an agreement for that object is not an independent agreement or a mere personal matter between the parties. Hence, in a recent case, where B., the consignee of a vessel, not owning any part of her, commenced discharging a quantity of hemp consigned to H., and before its discharge was completed, agreed with H. to stop discharging, because the weather was bad, but violated his agreement, and discharged all the hemp upon the wharf, where so much of it as had not been removed by H. was damaged by rain, it was held, on a libel *in rem* against the vessel, filed by H., that he was entitled to recover the loss occasioned by such damage.[2]

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[1] The Ship Grafton, Blatchford's R. 173; Kohn v. Packard, 3 Louis. R. 225; Cope v. Cordova, 1 Rawle's R. 203; Ostrander v. Brown, 15 John. R. 39; Hyde v. Navigation Co., 5 T. R. 394; Chickering v. Fowler, 4 Pick. R. 371; 1 Valin, 510; Strong v. Natally, 4 Bos. & Pull. 16; Northern v. Williams, 6 Louis. R. 579.

[2] The Ship Grafton, *supra*.

275. A promise by the master of a vessel to deliver goods to a consignee, does not require that he should deliver them to the consignee personally, or at any particular wharf. It is sufficient if he leaves them at some usual place of unloading, giving notice to the consignee that they are so left. If, after such notice, the consignee refuses to receive the goods, it is the duty of the master to take care of them for the owner; unless the consignee is under an obligation to receive them, in which case they will be at his risk.[1] The consignee is always bound to receive the goods when they are shipped on his order. He may also be bound to receive them by mercantile usage. In the case of Wilson v. Broom,[2] it appeared that a merchant in New Orleans instructed his agent in Thomaston to ship him lime at a certain limited price. The agent accordingly made a shipment on the 25th of October, and gave advice of it by letter, dated 31st of the same month. The vessel did not leave until the 3d of November. When she arrived in New Orleans, the merchant refused to take the lime, upon the ground that he had not been duly apprised of the shipment. The cause was tried in the Second District Court of New Orleans, and it was held, that the merchant, under the circumstances, not being bound to receive the lime, was exempt from any liability for a subsequent loss occurring to it. But upon appeal to the Supreme Court, the judgment of the District Court was reversed, it being adjudged that as the advice of the shipment was duly given, the merchant was

[1] 6 Louis. R. 381. See also White v. Kearney, 2 Ann. 639.

[2] Chickering v. Fowler, 4 Pick. 371; Ostrander v. Brown, 15 John. R. 39.

bound for the loss which occurred in a sale made in consequence of his refusal to accept the shipment. The doctrine laid down by the Court was, that when a party has contracted for a certain article at a fixed price, and improperly refuses to accept the article when offered to be delivered to him, he is liable for the loss sustained in a sale of the article. That loss will be the difference between the price agreed upon and the amount of the sale; and the amount of the loss may be fairly ascertained by a private sale at the market price of the article.

276. If the consignee should be dead or absent, or is not known, and cannot, after due efforts are made, be found, the master must not abandon the goods without protection. He will discharge himself, however, from further responsibility by placing the goods in store with some responsible third person in that business, at the place of delivery, for, and on account of the owner. And by so doing he will be entitled to his freight, together with all extra charges.[1] When the goods are so delivered, the storekeeper becomes the bailee and agent of the owner in respect to such goods.[2] In the case of the Schooner Cassius,

[1] The same authorities as before. See also Fisk v. Newton, 1 Denio. R. 45; Gibson v. Culver, 17 Wend. 305, as to the delivery of a parcel by a common carrier.

[2] Fisk v. Newton, *supra*. In this case the wharf was the place of delivery, and H. S. the person to whom, from the directions of the plaintiff, the goods were to be delivered. H. S. was unknown to the carrier. He did not call at the place of delivery for the goods. The consignee had omitted to inform the defendant (the carrier) of the particular residence of H. S., or of his occupation or place of business. He was a mere clerk, having no place of

where the master was, by his agreement with the shippers, to deliver the cargo at Velasco, but upon arriving there the consignee refused to receive it, it was held, that, as the cargo was not of a perishable nature, the master was bound to land it at Velasco, and store it for the benefit of the shippers, and could not carry it to another port, nor sell it; although it could not be sold at Velasco.[1] "If the consignee refused to receive the cargo," said Judge Story, "after it was landed, and to give the bill on New York for the freight, then it became the duty of the master to place the same in the hands of some trustworthy person for the security of his lien for the freight,

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business, his name not in the city directory, and was not discovered by the carrier, although reasonable efforts were made to find him. The consignor had misinformed H. S. as to the line by which the goods had been sent, and the person to whose care they were directed to be delivered; by reason of which H. S. did not receive the goods. The carrier put the goods in store with a responsible third person, for and on account of the owner, according to the usage of the trade at that place under such circumstances. Then the goods were lost through the insolvency of the storehouse-keeper, occurring several months after the delivery. It was accordingly held, that the risk of the carrier ceased on the delivery of the goods in store, and that the plaintiff was not entitled to recover. See also Gatcliffe v. Bourn, 4 Bing. New. Cas. 314, 330, 331; Story on Bailments, sec. 545; Kohn v. Packard, 3 Miller (Louis.) R. 225; Hand v. Baynes, 4 Whart. R. 204, 210; Hill v. Humphreys, 5 Watts & Serg. 123; Eagle v. White, 6 Whart. 505.

[1] The Schooner Cassius, 2 Story's R. 85. See also Brown v. Ralston, 9 Leigh (Va.) R. 532. The general rule, and it was recognised in this latter case, is, that the manner of delivery, and the period at which the master ceases to be responsible, depend, in the absence of agreement, on the custom of the place where the voyage terminates. Wardell v. Mourillyan, 2 Esp. N. P. Cas. 603; Mayell v. Potter, 2 Johns. Cas. 371.

and, subject thereto, for the benefit and account of the owners. But no right, even under such circumstances, could exist on the part of the master to sell the cargo, unless it was perishable, and might otherwise have been lost, or have perished, which is not proved or pretended by the answer. *A fortiori*, if the master had no right to sell at Velasco, because there was no necessity therefor, he could not have a right to carry the cargo elsewhere and sell it."

277. Carriers by land are bound to make a personal delivery of the goods intrusted to their care, unless there is a very clear and uniform usage or custom to leave them at a particular place of deposit, where the carrier is accustomed to stop. In this latter case, the carrier is bound to give notice of the arrival of the goods to the person to whom they are directed, if such person is known to him, and within a reasonable time. If, however, it is the established custom, to leave them at the place of deposit, at the risk of the owner, and without giving him any notice, then the owner is bound to apply for and secure them there.[1]

278. When personal delivery is required, it must be made at a reasonable time, and in a reasonable place and manner. If the goods are tendered after the hours of business, or when the consignee is unable to receive them, such tender will not discharge the carrier. His duty in such a case, would be to take the goods back, and keep them safely,

[1] Story on Bailments, sec. 543; Gibson v. Culver, 17 Wend. R. 305, 306; Gatcliffe v. Bourn. *supra*.

and under all his responsibility as carrier.[1] But with respect to the foreign and coasting trade, the rule, as we have seen, is different. Personal delivery is not required. The reason is obvious. A ship, trading from one port to another, has not the means of carrying goods on land; and, therefore, according to the established course of trade, a delivery on the usual wharf, with notice to the consignee, is such a delivery as will discharge the carrier.[2]

279. When the consignee demands that the goods

[1] Hill v. Humphreys, 5 Watts & S. 123; M'Henry v. R. R. Co., 4 Harr. R. 448. He must store the goods, if necessary, unless there is a contrary usage. Eagle v. White, 6 Whart. 505.

[2] Story on Bailments, sec. 544; Gatcliffe v. Bourn. 4 Bing. N. C. 314; Strong v. Natally, 4 Bos. & Pull. 16; Northern v. Williams, 6 Louis. R. 579. Mr. Angell, in his work on Carriers, p. 309, expresses the opinion that the difference in the ingredients necessary to constitute a sufficient delivery by the inland and foreign ship carrier, arises from the nature of their respective contracts: the latter, undertaking, by the bill of lading, to convey from port to port, is discharged by a delivery pursuant to the undertaking; the former, contracting to deliver to the consignee is bound to the performance of an actual delivery in accordance with his contract; though if he had only engaged to convey generally from one place to another, a delivery at the latter place might discharge him, as that at the port does the ship carrier; in the case, for instance, where the land carrier's warehouse is the place of delivery. But this exposition of the difference established in the two cases is not satisfactory. And for the obvious reason, that the foreign ship carrier undertakes to do more than to carry from port to port. He stipulates to make a delivery to the consignee when he has arrived at the port of destination. He is bound to make such delivery, equally with the inland carrier. But the law deems that a delivery in the one case, which it does not so deem in the other, establishing the difference in the mode of delivery, on account of the difference in the means of transportation.

should be delivered to him on board the ship, the master, it seems, must comply therewith. And if the goods are put on board of a lighter in the customary way, and the owner then takes an exclusive custody of them, before they are landed, the carrier is discharged from any subsequent loss.[1]

280. By the maritime as well as the common law, there is a lien on the goods shipped for the freight due thereon, whether it arise under a common bill of lading, or under a charter-party. But this lien may be waived by consent. The stipulations in charter-parties often render it difficult to determine whether they are or are not inconsistent with the existence of the lien. For instance, if the delivery of the goods is by the charter-party to precede the payment or security of payment of freight, such a stipulation furnishes a clear dispensation with the lien for freight; for it is repugnant to it, and incompatible with it. On the other hand, where such payment, or security of payment of freight, is to be simultaneous or concurrent with the delivery, then the lien exists in its full force, and may be insisted on.[2]

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[1] Syeds v. Hay, 4 Term R. 260; ante, note to sec. 273; Strong v. Natally, *supra*. See, also, Violett v. Stettinius, 5 Cranch. C. C. R. 559, as to the receipt of property by the consignee before it reaches its destination. The demand and receipt, in such a case, make the consignee liable for full freight.

[2] The Volunteer, 1 Sum. R. 551. In this case, the charter-party provided for the payment of the freight, "within ten days after her (the schooner's) return to Boston, or, in case of loss, to the time she was last heard of." It was held, that this stipulation did not require a delivery of the cargo within the ten days, or

281. Ordinarily, however, the shipper cannot insist on a delivery of the goods to him, until the freight or lien is paid or secured according to the terms of the agreement. At the same time, the carrier is not at liberty to insist that the goods shall not be landed before such security or payment is made. On the contrary, the shipper has a right to insist upon examining the goods, after they are delivered, in order to ascertain whether they are damaged or not, before he makes himself liable at all events for the freight.[1]

282. The master may detain any part of the mer-

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any delivery at all, without payment of freight. The delay of payment for ten days, allowed by the charter-party, did not waive the lien, or entitle the shipper to receive the goods without payment of the freight. See, also, Yates v. Railston, 8 Taunt. R. 293; Christie v. Lewis, 2 Brod. & Bing. R. 410; Tate v. Meek, 8 Taunt. R. 280; Saville v. Campion, 2 Barn. & Ald. R. 503; Faith v. East India Co., 4 Barn. & Ald. R. 630; Gracie v. Palmer, 8 Wheat. R. 605; Certain Logs of Mahogany, 2 Sum. R. 589. In the latter case, a clause in the charter-party provided for the payment of freight, "in five days after her (the brig's) return and *discharge* in Boston." It was held, that this was no waiver or displacement of the lien for freight; the word discharge merely referring to the unlading, and not to the delivery of the cargo. Hodgson v. Woodhouse, 1 Cranch, C. C. R. 549; Ross v. Johnson, 5 Burr. 2825; Abbott on Shipp. 461; Clemson v. Davidson, 5 Binn. R. 392, as to waiver of lien by implication.

In Hodgson v. Woodhouse, *supra*, which was trover against the master of a vessel for cheese and porter, it was held, that the action would not lie, unless it was established that the freight was paid, or tendered, or the payment waived; nor would it lie, if the goods were lost so that they did not come to the use of the defendant.

[1] Certain Logs of Mahogany, *supra*, 1 Valin, p. 661; Baolay Paty, tome ii. 391. If the goods are damaged, the carrier is liable to the consignee. 4 M'Lean's R. 325.

chandise for the freight of all that is consigned to the same person. Hence, if the master in such case makes a delivery of part of the goods to the consignee, he may retain the residue even against a purchaser, until payment of the freight of the whole. But if the goods are sold to different persons by the consignee, and part is delivered, the master has not a lien upon the residue so as to compel one purchaser to pay freight for what has been delivered to another purchaser; but only for what has been purchased by himself.[1]

283. When the ship is detained by a hostile embargo, but the cargo is exempted, this is considered as discharging the lien which the master had upon the goods.[2] In general, where enemies' goods are captured in a neutral ship, the captors take *cum onere*, and if the conduct of the neutral has been perfectly fair and impartial, it is the practice of prize courts to allow him his full freight, in the same manner as if the original voyage had been performed.[3]

284. The same principles, as we shall see here-

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[1] Abbott on Shipp. 461, and note 2; Soldergreen v. Flight, 6 East, 622.

[2] The Theresa Barrita, 4 Rob. R. 236.

[3] The Hoop, 1 Rob. 196, 219; The Antonia Johanna, 1 Wheat. R. 159; 2 Wheat. R. Appendix, 50. In Gorling v. Higgins, 1 Camp. R. 451, it was held by Lord Ellenborough, that if the master could not deliver the goods, because of their illegal seizure and detention by the revenue officers, the shipper might nevertheless maintain an action against the carrier for the non-delivery, and that the latter had an action against the officers.

after, which apply to the carriage of goods, equally apply to the carriage of passengers, and as in the one case, the goods may be detained for freight, so in the other the baggage of a passenger may be detained for the passage-money. But the master has no lien on the passenger himself, or the clothes which he is actually wearing when he is about to leave the vessel; but the lien extends to any other property he may have on board.[1]

285. "On the arrival of the vessel at her homeward port, and when compelled by accidents or injury to put back, or into a port other than that of her destination, it is usual," says Lord Tenterden, "for the master to present himself before a notary, and cause a protest to be noted, and afterwards drawn up or extended. British consuls at foreign ports are empowered by statute to perform notarial acts; but inasmuch as their attestation would probably not be deemed abroad of equal authenticity with that of the regular public notary, the master would do well to address himself to that functionary. He should remember, however, that our courts do not adopt the rules of evidence which prevail in foreign courts, and although copies of documents attested by a public notary may be evidence of the originals abroad, they will not be received as such in England. The protest is a declaration or narrative, by the master, of the storms or bad weather which the vessel may have encountered, the accidents which may have occurred, and the conduct which, in cases of emer-

[1] See post, tit. Freight; The Aberfoyle, Blatchf. R. 360; The Pacific, Ibid. 569; The Lavinia, 1 Peters' Ad. R. 126; Griggs v. Austin, 3 Pick. 20; Wolf v. Summers, 2 Camp. A. 629.

gency, he had thought proper to pursue. With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or his owners; but it may be evidence against him and them, and he should take care to supply from the log-book, his own recollection, and that of the mate, or trustworthy mariners, true and faithful instructions for its preparation. Protests are often of great utility in matters connected with the adjustment of losses in marine insurance, and in the calculation of averages; they are received as evidence in foreign courts, and with us credit is often given to their contents by merchants and underwriters, when free from all circumstances of suspicion. Protests are also made by the master against the charterers of the ship or the consignees of goods for not loading or unloading the vessel pursuant to contract, or within reasonable or stipulated delays; and by the merchant against the master for misconduct, drunkenness, &c., for not proceeding to her with due despatch, for not signing bills of lading in the customary form, and other irregularities."[1]

286. We have quoted these observations, to show the nature and objects of a protest. They deserve attention, as they define the duties of the master under the circumstances described, and the force and value of the protest which he makes. It remains to say, in addition, that by our law, the master on his arrival in port, in case of a disaster, is bound to give, in writing, a verified statement of the circumstances

[1] Abbott on Shipping, 465, 466. See also the Betsey Caines, 2 Hagg. Ad. R. 28; Senat v. Porter, 7 T. R. 158; 10 B. & C. 511; 2 Stark. 6; 6 M. & Sel. 34, 39.

attending the voyage and the loss. The French law requires the master, within twenty-four hours after his arrival in port, to make his report (in our law termed a protest), containing the place and time of his departure, the course he has kept, the dangers he has run, the accidents and all the remarkable circumstances of the voyage. The report is to be made to the Tribunal of Commerce, and if in a foreign port, before the French consul, or, in the absence of either, before a magistrate; and the report is to be verified by the master, and under circumstances, together with the crew.[1]

287. When there are conflicting claims to the property, the master must act with caution in making the delivery. He must inquire into the circumstances of the consignee's title, and to whomsoever he delivers the goods, he must take care to obtain adequate indemnity for the risk he incurs in so doing. We have elsewhere observed, that prudence would dictate delivery to the party upon whose indemnity he can most safely rely.[2]

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[1] Code de Commerce, art. 242–248; 3 Kent. 213, note, containing an abstract of the requirements of the Code, as stated in the text.

[2] Post, tit. Conveyance of Goods in a General Ship. See also Wilson v. Churchman, 4 Louis. R. 452. The facts in this case were as follows: On the 5th of January, 1848, the plaintiffs made a cash sale to Churchman of a quantity of flour, which was delivered. Churchman shipped it on board a vessel commanded by Gilchrist, bound to Philadelphia. Churchman received, as shipper, a bill of lading in the usual form, for the delivery of the cargo in Philadelphia, to Fleming, or his assigns. After this bill of lading was despatched by mail to Philadelphia to the consignee, the plaintiffs commenced a suit against Churchman, and seized the flour on shipboard at New Orleans, under a writ of sequestration,

288. "But he ought not," says Chancellor Kent, "to be put to the peril and necessity of indem-

and a claim of the vendor's privilege. The sequestration was levied on the 10th of January, and on the 11th, Gilchrist, as agent of the ship-owners, gave bond for the property, and was reinstated in its possession. On the 27th of January, Gilchrist filed a petition, by way of third opposition, in which he alleged himself to be master and part owner of the vessel. He stated that the bill of lading had been given before the sequestration, and had been forwarded to the consignee; that the plaintiffs had made no offer to return the bill of lading; that he was bound to deliver the flour at Philadelphia to the consignee, or whoever might be the holder of the bill, and was entitled to the possession and custody of the property in preference to the plaintiffs. At the trial, the execution of the bill of lading, and the fact of its being mailed to Fleming's address before the levy of the sequestration, were proved. The plaintiffs proved the sale of the flour, Churchman's failure to pay, and that he was in failing circumstances. On appeal from the judgment of the District Court, and a hearing before the Supreme Court, the opinion of this tribunal was delivered by Slidell, J. "It is certain that the plaintiff's goods are gone, without their having received any equivalent for them. It is also certain, that, if the Philadelphia consignee was neither a *bonâ fide* purchaser nor advancer, but was the mere agent of the consignor, who has attempted to defraud his vendor, the consignee would have no greater right to defeat the vendor's privilege than the vendee himself would have had. The vendor took the risk of the consignee's being neither a *bonâ fide* purchaser nor advancer, and caused the goods to be sequestered. The allegations of the petition gave the captain full notice that the plaintiffs had been defrauded; and the judicial process would have excused the captain to the consignee for not delivering the goods, provided he gave the consignee prompt notice of the sequestration, and took, in the meanwhile, such conservative steps in the cause as would arrest the action of the Court until the consignee could come in and assert his rights. Unquestionably the Court would have given time for that purpose, upon a proper application, and would also have indemnified the captain, at the plaintiffs' expense, for his trouble and loss in unloading the goods, &c. But the captain undertakes to bond the goods, and to

nity, and it is desirable that he should know to whom of right he can deliver the goods. If the consignee has failed, he ought to deliver to the claimant on behalf of the consignee; and if the consignee has assigned the bill of lading, and the rights of the consignor be still interposed and contested, it is safest for the master to deposit the goods with some bailee, until the rights of the claimants are settled, as they can always be, upon a bill of interpleader in chancery, to be filed by the master. Having made a consignment, the consignor or seller has not an unlimited power to vary it at pleasure. He may do it only for the purpose of protecting himself against the insolvency of the buyer or consignee."[1]

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carry them to Philadelphia. We are not prepared to say that he had not a right to take this course. It is unnecessary to determine that point. But if he had, the question is, what he should have done when he arrived there? With full notice that the plaintiff had been defrauded, it was his duty to inquire into the circumstances of the consignee's title and rights. If he had doubts as to those rights, he might probably have been permitted to protect himself by a bill of interpleader, calling upon the plaintiffs, the consignor and consignee, to litigate *inter se*. Or, he could have refused to deliver the goods, if satisfied, upon inquiry, that the consignee was a mere agent, and not a consignee for value. But the captain has not thought proper to show that he took any precaution whatever; or even that he ever delivered the goods at all. *Non constat*, that they are not still in his possession. At any rate, if he delivered the goods to the consignee, he has not shown that the consignee was entitled to them. Under these circumstances, we think that the case is with the plaintiffs; and that the captain had no right to rely upon the naked fact that he had signed and issued a bill of lading." It was also held, that a bill of lading, like a bill of exchange, only imports that the holder is *prima facie* a holder for value.

[1] 3 Kent, 215.

## CHAPTER XII.

### OF THE SHIP-OWNER'S RESPONSIBILITY.

289. THERE is no difference, in point of law, between common carriers by water, and common carriers by land. Each incurs the same obligations and liabilities, and is subject to the same duties.[1] Under-

[1] King v. Shepherd, 3 Story's R. 349; 1 Phillips on Ins. 485, 486; Elliott v. Russell, 10 John. 1; Plantamour v. Staples, 1 Marsh. on Ins., 169; S. C., 1 Term R. 611. I am aware that Gibson, C. J., in the case of Hart v. Allen, 2 Watts. R. 114, suggested certain differences in contracts for carriage by land, and those for carriage by water. But I do not understand him to intimate any difference in the rights and obligations incurred by the respective carriers. "But it has been supposed," he observes, "that there is a difference, depending on the peculiar nature of affreightment, between the liability of a carrier by water and that of a carrier by land; and that being an insurer, there is of necessity in the contract of the former, as in every contract of marine insurance, an implied warranty or condition of seaworthiness. If that be the foundation of the doctrine, it falls to the ground in every case like the present; for it is not to be admitted that the law of maritime contracts can be applied to fresh-water transactions; or that calling the receipt of a carrier on the Ohio a bill of lading, or the misapplication of other terms appropriate only to maritime commerce, can change the essential character of the things designated by them. Steamboats on the Ohio, and ships in the foreign or coasting trade, are subject to different laws, both municipal and international, as regards registry, ownership, documents, hypothecation, insurance, freight, wages, autho-

taking, as he does, to carry goods for all persons, he is considered as engaged in a public employment, and as engaging beforehand to carry goods for a reasonable remuneration for any person who may apply to him and pay the hire, and he will be liable to an action for refusing, unless he has a reasonable cause for his refusal. The law, for strong reasons of public policy, holds him to a very rigorous responsibility. He is answerable not only for his own acts, but for those of his agents and servants.[1]

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rity of the master, and a variety of other matters; as well as the rights and remedies to which they give rise, and the Courts which have recognisance of them. How far principles of maritime law may be applicable to the navigation of the great American lakes, which are, in fact, inland seas, and have been the field of naval achievement and glory, it is unnecessary to say; but the hiring of a boat for purposes of transportation on one of our freshwater rivers, I take to be attended with no peculiar incident of a charter-party of affreightment, the contract being regulated exclusively by the common law. But these incidents are immaterial as to their supposed effect on the present question, *because the same rule in respect to the vehicle is undoubtedly applicable to every sort of carriage, the owner of a ship being liable as a common carrier, on strict common law principles, for damage occasioned by any defect of seaworthiness, just as a carrier by land is liable for damage occasioned by any defect in his wagon.* The assertion that the carrier is bound to provide a sufficient vessel, or bear the consequences of the default, is nothing more than an application of the general principle of his responsibility to a specific case; and not the designation of a superadded duty, as might be supposed from the particularity with which it is repeated by elementary writers on the subject of the freight; and hence perhaps the origin of the impression that there is one rule for the water, and another for the land."

[1] The Huntress, Davies' R. 82, 86; Story on Bailments, sec. 502.

290. Before proceeding to define the limits of his responsibility, and the causes that will discharge him from liability in cases of loss or injury to the goods, we may observe, that a contract for the transportation of goods on the sea, is clearly within the jurisdiction of a Court of Admiralty. It is a maritime contract. And "all causes of Admiralty and maritime jurisdiction," are made by the Constitution, cognizable by the Federal Courts. "If the word *maritime*," observes Judge Ware, in his learned note, appended to the case of The Huntress,[1] "has any meaning (as used by the Constitution), and was not used merely for the purpose of rounding the phrase, it must include such a contract; and we are not gratuitously to suppose that words in the Constitution were used without meaning. Besides, the service of the seamen is not denied by any to be a maritime service, and as such a proper subject of maritime jurisdiction. This service consists in the transportation of the goods. The ship-owner, as a carrier,

[1] The Huntress, *supra;* The New Jersey Steam Navigation Co. v. the Merchants' Bank, 6 How. 344. The opinion delivered in this case by Mr. Justice Nelson, was concurred in, it is understood, by Mr. Chief Justice Taney, Mr. Justice M'Lean, and Mr. Justice Wayne,—Judges Catron, Daniel, and Woodbury *dissentiente*. The decision of the Court affirmed a decree of the Circuit Court of Rhode Island, which was a judgment upon a libel *in personam* against a steamboat company for the loss of specie carried in their boat by one of the persons called "express carriers," and lost by fire in Long Island Sound. Whilst the judgment of the Court in this particular case, is very ably, and perhaps satisfactorily sustained by the opinion of Mr. Justice Nelson, it must be confessed that the Court, in its more recent decisions, has extended the jurisdiction of the Admiralty to a very questionable extent. We mean particularly, as that jurisdiction relates to locality.

performs it by his servants, the master and ship's company. To admit the jurisdiction in one case, and deny it in the other, is to affirm of the same service, that it is and that it is not maritime, or else to affirm that the term maritime, as used in the Constitution, is an unmeaning expletive,—a supposition so preposterous, not to say indecent, to the memory of the illustrious statesmen who framed that instrument, that it is not to be for a moment entertained."

291. If the goods are lost or damaged whilst in the custody and control of the master, the *onus probandi* is upon him, to prove that the loss was occasioned by some cause for which the law will excuse him. *Prima facie*, the obligation of safety is upon him.[1] The ship is, by operation of law, hypothecated to the shippers for any loss she may sustain from the insufficiency of the vessel, or the fault of

[1] Story's Bailments, sec. 529; Elliott v. Russell, 10 John. R. 1; Morse v. Slue; T. Raym. 220; 1 Vent. 238, 290; Molloy, B. 2, c. 2, s. 2. The master is answerable, says Molloy, *supra*, "i the goods be lost or purloined, or sustain any damage, hurt, or loss, whether in the haven or just before, or upon the seas after she is on her voyage." If there be any exception as to this responsibility at sea, it proceeds from the special provision in the charter-party, or bill of lading, and not from any suspension of the rule. Such exception is strong evidence of the acknowledged law which rendered them necessary. In short, it must be regarded as a settled point in the English law, that masters and owners of vessels are liable in port, and at sea, and abroad, to the whole extent of inland carriers, except so far as they are exempted by the exceptions in the contract of charter-party, or bill of lading, or by statute. Elliott v. Russell, *supra*; M'Clure v. Hammond, 1 Bay's R. 99; Bell v. Reed, 4 Binn. R. 127.

the master or crew. In the common form of charter-parties, a clause is usually inserted by which the ship and freight are specifically bound for the performance of the covenants therein contained. But when such clause is omitted, it is tacitly annexed by the law to every contract entered into by the master for the transportation of goods, whether by bill of lading or charter-party.[1]

292. So too, if the usual clause in charter-parties and bills of lading, specially exempting the master and owners from losses occasioned by the dangers of the seas, be omitted, it does not affect the question of liability. Because, this exception of the dangers of the seas, the law itself silently supplies without

[1] The Brig Casco, Davies' R. 184. This was a libel on a charter-party. The master of the Brig Casco, chartered her to the libellant for a voyage to Porto Rico, to carry a cargo of lumber, and from thence to her port of discharge in the United States, touching at Turks Island for a cargo of salt, if required by the charterer. The voyage was performed to Porto Rico, and the cargo delivered. From that place she went to Turks Island, and took a cargo of salt. On her return from Turks Island, she was found to leak so badly that a large part of the salt was lost. Of 5676 bushels laden, only 3132 bushels were delivered at Portland, the deficiency amounting to 2544 bushels. This libel was brought by the charterer against the vessel, to recover damages for the loss. The charter-party, in its form, was somewhat special and peculiar. There was no clause by which the ship and freight were specifically bound for the performance of the covenant in the charter-party. It was held, as stated in the text, that they were bound in the absence of such clause. There was no clause exempting the master and owners from losses occasioned by the dangers of the seas. It was held that they were exempt without such clause. Other points involved in this case, will be considered in a subsequent note.

its being formally expressed. It is a general rule of law, founded upon the plainest and most obvious principles of natural justice, that no man shall be held responsible for fortuitous events and accidents of major force, such as human sagacity cannot foresee, nor human prudence provide against, unless he expressly agrees to take these risks upon himself. *Casus fortuitos nemo præstat.*[1]

293. There is an exception to the foregoing rule, but which is entirely consistent with the principle of the rule itself. It is, when the party to be charged has been guilty of some fault, without which the loss could not have happened. The liabilities of the owners in that case are precisely the same, and no more extensive than they would have been if the usual exception of the dangers of the seas had been inserted in the charter-party.[2] The law never requires impossibilities. *Impossibilium nulla obligatio est.* But when a party is chargeable with a neglect or fault, without which the loss would not have happened, he will then be held responsible for a loss by inevitable accident, or an accident of major force. It is not that the casualty is imputed to him, but his own neglect or fault, which is the occasion of the accident proving fatal.[3]

[1] The Brig Casco, *supra*; Pothier, Des Obligations, No. 142, Dig. 50, 17, 23; Story's Bailments, s. 25; The Paragon, Ware's R. 324; Williams v. Grant, 1 Conn. 587.

[2] The Brig Casco, *supra*.

[3] As an illustration of the principle stated in the text, the reader will excuse a recital, somewhat at length, of the opinion of Judge Ware, in the case of the Brig Casco, *supra*. "If the injury to the vessel," he asks, "was so inconsiderable, the question

294. The phrase "danger of the seas," in the sense known to the law, must be understood to include

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presents itself, How happened it that so large a part of the cargo was lost? All the witnesses who examined the vessel before the cargo was discharged, agree in ascribing the loss to two causes: *first*, the limber holes (which are small holes made in the under part of the floor timbers next the kelson, making a passage for the water to flow from the forward part of the vessel back into the well), it appears, were chocked up, so as to prevent the flow of the water. A considerable quantity of water, which should have found a passage back into the well, was thus constantly kept forward between the ceiling or skin of the vessel and the outside planks. The *second*, was the want of sufficient dunnage at the bilge, between the first and second thick streaks in the forward part of the vessel. All the witnesses agree that there was sufficient dunnage on the floor, and also on the sides of the vessel in the after part. But at the bilge, between the two thick streaks, from the mainmast forward, there was on the starboard side about eighty square feet, and on the larboard side about forty square feet, uncovered with dunnage. On examining the ceiling here, the seams were found to be open. On the starboard side, one seam was open for five or six feet to the width of five-eighths of an inch, and on the larboard side there was a seam open as wide for fifteen or sixteen feet; and generally the ceiling was not sufficiently tight to prevent the water from being forced through by the motion of the vessel. The vessel having a flat floor, when she was sailing with the wind on her beam and thrown down on the opposite side, the water, which was prevented from passing through the limbers into the well, was washed down to her bilge, and by the motion of the ship blown up through the open seams of her ceiling directly upon the salt. Nearly all the witnesses agree that it was in this way that the salt was lost. And in point of fact, the whole extraordinary wastage was in the forward part of the vessel; the loss in the after part was not more than what is usual. The evidence also is, that the salt melted most in the larboard wing, though that was better supplied with dunnage than the other side. But then it appears from the log, that the vessel, during the greater part of the passage, was sailing on her larboard tack, and this would naturally

only such losses as are of an extraordinary nature, or arise from some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.[1] "Perils of the sea," says Chancellor Kent, "denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus*, was defined in the civil law to be *quod damno fatali contingit, cuivis diligentissimo pos-*

occasion the most waste, if it was produced by the blowing of the water through the seams of the ceiling. On a view of the whole evidence, it may, I think, safely be taken as an established fact, that the loss of the salt arose from the two causes that have been mentioned.

"The whole case, then, seems to be reduced to this, whether the neglect of the owners to provide means for clearing the limber-holes, and the neglect of the master to place sufficient dunnage on the wings of the forward part of the vessel to protect the salt from the water, are faults of such character as to render the parties legally responsible for a loss occasioned by these very deficiencies. If no fault can be imputed to the master or owners on this ground, the loss must be ascribed solely to the dangers of the seas, and be borne by the shipper. . . . . .

My opinion on the whole is, that the neglect upon the part of the owners to provide means by which the limbers might be kept open so as to leave a free passage for the water from the forward part of the vessel to the well, and the omission on the part of the master to provide proper dunnage for the wings of the forward part of the vessel, are such neglects as render them legally responsible for a loss that may be ascribed directly to those deficiencies." See also, Williams v. Grant, 1 Conn. 487, as to the effect of previous negligence or misconduct, by which the loss may have been occasioned, although arising from an inevitable necessity existing at the time of the loss.

[1] The Schooner Reeside, 2 Sum. R. 567; Forward v. Pittard, 1 T. R. 33.

*sit contingere.* It is a loss happening in spite of all human effort and sagacity. The only exception to this definition is, the case of a vessel captured and plundered by pirates, and that has been adjudged to be a peril of the sea."[1]

295. Before proceeding to mention particular perils, which excuse the carrier from liability arising therefrom, it is proper to observe, that although the loss occurs by a peril of the sea, yet if it might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurs, it is not deemed to be, in the sense of the phrase, "perils of the sea," such a loss as will exempt the carrier from liability, but rather a loss by the gross negligence of the party.[2]

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[1] 3 Kent, 216; Pickering v. Barkley, Styles, 132; Barton v. Wolliford, Comb. 56; Williams v. Grant, 1 Conn. 487; Potter v. Suffolk Ins. Co., 2 Sum. R. 197; Hollingsworth v. Brodrick, 7 Adolph. & Ell. 40; Waters v. Merchants' Louisville Ins. Co., 11 Peters' R. 213; Story's Bailments, s. 512.

[2] Story's Bailments, s. 512; Crosby v. Fitch, 12 Conn. R. 410; Fairchild v. Slocum, 19 Wend. 329. The Brig Casco, Davies' R. 184; Williams v. Grant, *supra*. "It is very clear," observed his honor, Judge Gould, in this latter case, "that a common carrier is liable, under a general acceptance, for all losses, except such as are occasioned by inevitable accident, the act of public enemies, or the act or default of the bailor himself. In the case now before the Court, neither any act of public enemies, nor any act or default of the plaintiffs, is in question. . . . It is a condition precedent to the exoneration of common carriers, that they should have been in no default; or, in other words, that the goods of the bailor should not have been exposed to the peril or accident which occasioned the loss, by their own misconduct, neglect, or ignorance. For though the immediate or proximate cause of a loss in any given instance, may have been what is termed the act of God, or

296. If a rock or sand-bar, on which a vessel strikes, was generally known, then it was the duty of the master to have known and avoided it, and the loss is imputable to his negligence. If the situation of the rock or sand-bar was not generally known, and the master did not actually know it, then if he conducted properly in other respects, and no fault is imputable to him, his striking on the one or the other would be a peril of the sea, and an unavoidable accident; and he would not be liable for the loss. For though the rock or sand-bar had been there for ages, yet, if they had never been discovered before, it is the same thing as if they had been placed there immediately before the accident happened.[1]

297. A loss by lightning is within the exception

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inevitable accident; yet, if the carrier unnecessarily exposed the property to such accident, by any culpable act or omission of his own, he is not excused. I recollect a case put, in some book, to this effect: That if a common hoyman unnecessarily puts to sea, under circumstances which render a loss of the goods on board probable—as in very tempestuous weather—he is liable, in the event of a loss, though it were immediately occasioned by the elements, over which he had no control. This I take to be law." See also Garrett v. Davis, 6 Bing. R. 716. It seems to have been supposed by Gould, J., in Williams v. Grant, *supra*, that the phrases "act of God," and "perils of the sea," were commensurate, and of equivalent import. But this is by no means universally true. The phrase "perils of the sea" is of broader compass than the phrase "act of God." See M'Arthur v. Sears, 21 Wend. 190; Story on Bailments, 323; 2 Kent, 472; The Reeside, 2 Sum. 571.

[1] Williams v. Grant, *supra*, 3 Kent, 217; Story's Bailments, s. 516; 1 Phillips on Insurance, 249; Roccus, N. 55, 56; The William, 6 Rob. R. 316; Hahn v. Corbett, 2 Bing. R. 205; Smith v. Shepherd, cited Abbott on Shipp. 399, 469.

of the act of God; but a loss by fire, proceeding from any other cause, is, according to the doctrine of the common law, chargeable upon the ship-owner. The same doctrine applies to the case of vessels propelled by steam. True, in vessels so propelled, it may be difficult to prevent conflagration, but accidents of that nature, it cannot be said, are beyond the power of human skill and prudence.[1]

298. This principle governed the decision of the Court in Harrington v. M'Shane.[2] The fire which consumed or occasioned the loss of the shipper's property, was the result of accident, without any neglect of the master and crew; they on the contrary having used every possible exertion to rescue it from the flames. The circumstances that distinguish this case were peculiar. It appeared by the evidence, that it was the usage on the western waters for steamboat owners, in addition to the business of carrying goods, to act as factors, to make sales and returns, without being paid any other consideration than freight. It also appeared, that the carrier, by his agent, who was also part-owner in the boat, received the shipper's flour, to transport to Louisville, and sell, in consideration of being paid a certain freight per barrel. The flour was taken to Louisville and sold, and the money which it produced was in the boat on its return up the river, separated from other moneys, and was destroyed by a fire which consumed the boat and its contents. Sergeant, J., in delivering the opinion of the Court, after observing, that a

[1] 3 Kent, 217; Gilmore v. Carman, 1 Smedes & Mar. R. 279.
[2] 2 Watts, 443.

common carrier is responsible for all losses in the course of his employment as such, except those occasioned by the act of God or the public enemy, but that a consignee or factor, on the other hand, was responsible only for negligence, proceeded as follows: "The question of the defendants' responsibility in the present case, depends on the character in which they held this money when the loss occurred. If they were merely factors, they are not responsible; if they were carriers, the reverse must be the case. Had the flour been lost in the descending voyage by a similar accident, there could be no doubt whatever of the defendants' liability; they were certainly transporting it in the character of carriers. On their arrival at the port of destination and landing the flour there, this character ceased, and the duty of factor commenced. When the flour was sold, and the specific money, the proceeds of sale, separated from other moneys in the defendants' hands, and set apart for the plaintiffs, was on its return to them by the same boat, the character of carrier reattached. The return of the proceeds by the same vessel is within the receipt and the usage of trade as proved, and the freight paid, may be deemed to have been fixed with a view to the whole course of the trade, embracing a reward for all the duties of transportation, sale, and return. If the defendants, instead of bringing the money home in their own vessel, had sent it on freight by another, there would have been to the plaintiffs the responsibility of a carrier, and there ought not to be less if they chose to bring it themselves. If they had mixed the money up with their own they would have no excuse for non-payment.

The defendants can be relieved from responsibility only by holding that the character of carrier never existed between these parties at all, or that if it existed on the descending voyage, it ceased at its termination, and that of factor began and continued during the ascending voyage. But if the defendants bring back, in the same vessel, other property, the proceeds of the shipment, whether specific money or goods, they do so as carriers, and not merely as factors."

299. The Court proceeded upon the same principle in the case of Patton v. M'Grath.[1] That was an action for the value of a quantity of cotton burned on board of a steamboat. It appeared that proper diligence had been used, but still the owners were held liable. There was also an attempt to defend the action on the ground that usage or custom exonerated the owners in such cases, where they had used proper diligence. The Court held that no distinction could be taken between steamboats and other vessels; that all were alike liable in such a case; and that custom, to constitute an exception to the rule of law, must have been immemorial, certain, and reasonable.

300. By the civil law, if the master and crew use proper diligence, and notwithstanding the vessel or steamboat is destroyed by fire, the owner is not liable.[2] The maritime law, in this particular, con-

[1] 1 Dudley's R. 159; 5 Yerger, 71.

[2] Hunt v. Morris, 6 Martin's Louis. R. 676. See also Hunter v. The Morning Star, Newfoundland R. 270, cited 3 Kent, 216.

forms to the civil, upon which, indeed, it is partially based, and from which it derives, as from a pure and perennial spring, many of its most distinguishing and valuable principles. Whether, however, our Courts of Admiralty would feel themselves at liberty to adopt, in this respect, the doctrine of the civil, in preference to that of the common law, is questionable. Our American maritime law, and the same observation is applicable to the English maritime law, by the influence of usage, and the incorporation into it of many of the principles of the prevailing law of the land, stands upon a somewhat different foundation from the general law of Europe.

301. If the carrier receives goods, subject to certain directions of the shipper as to how they shall be carried, as, for instance, if he receives a box, marked, "glass—with care—this side up," he is bound to carry it in the manner and position required by the notice. The carrier, it is true, has the right to fix his own rate for the carriage, or refuse altogether to take the goods with such directions. But having taken them, he is bound to carry them according to the direction.[1]

302. If he fails to do so, and the goods are injured in consequence, he will be responsible for the damages. His failure to carry them in the manner directed, is evidence both of negligence and breach of contract; still, if the loss was not the consequence of such negligence, the carrier is not the more responsible on that

[1] Hastings v. Pepper, 11 Pick. R. 41.

account. But the carrier is bound to stand to the loss, unless he can prove affirmatively and beyond reasonable doubt, what was the cause of the loss, and that such cause was not attributable in any degree to his negligence or breach of contract.[1] This we think is the reasonable doctrine. The authorities, however,

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[1] Hastings v. Pepper, 11 Pick. R. 41. See also Crosby v. Fitch, 12 Conn.; Garrett v. Davis, 6 Bing. 716. It was urged in this case, that there was no natural or necessary connexion between the wrong of the master in taking the barge out of its proper course, and the loss itself; for, it was contended, the same loss might have happened by the very same tempest, if the barge had proceeded in her direct course. Tindal, C. J., replied to this argument as follows: "If this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For, if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet in Parker v. James, 4 Camp. R. 112, where the ship was captured whilst in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by a storm in the one course, no one can predict, that she might not equally have struck upon another rock, or met with the same or another storm, if pursuing her right or ordinary voyage. The same answer might be attempted to an action against a defendant who had, by mistake, forwarded a parcel by the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable." But the real answer to the objection taken by the counsel, was, observed the learned Judge, "that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action, the bare possibility of a loss, if his wrongful act had never been done. *It might admit of a different construction, if he could show, not only that the same loss might have happened, but that it must*

are not entirely in harmony with it. One class of cases has proceeded upon the principle, that where the carrier has been guilty of deviation or breach of contract, he thereby becomes an insurer, and is absolutely responsible for any loss or injury that may occur. Another class, on the other hand, has held, that the carrier is only responsible for such loss or injury as results from the deviation or breach of contract. This, with the qualification that the *onus* is upon the carrier to show, that the loss or injury would equally have happened had there been no breach of contract or deviation, is founded upon the correct principle, and is supported by the weight of authority.[1]

303. The freezing of canals or rivers is such an

*have happened, if the act complained of had not been done.*" See also Williams v. Grant, 1 Conn. 492; Read v. Com. Ins. Co., 3 Johns. R. 348; Urquhart v. Barnard, 1 Taun. 456; Hughes on Ins. 197; 3 Kent, 165; Pothier, Contrat de Louage, s. 410; Du a Prêt Usage, s. 56, 57.

[1] See the foregoing cases, also Souter v. Baymore, 7 Barr, 415; The Ninetta, Crabbe's R.; Powers v. Davenport, 7 Blackf. (Ia.) R. 495; Hart v. Allen, 2 Watts, 114; Dick v. Reed, 8 Id. 479. See also Runguist v. Ditchell, 3 Esp. N. P. R. 64; Magalhaem v. Busher, 4 Camp. 54. These cases establish the doctrine, that if a ship be advertised by the agent of the owner for freight as a general ship, and the notice states that she is to sail with convoy, this amounts to an engagement to that effect; and if she sails without convoy and is lost, the owner becomes answerable to the shipper in damages for the breach of that representation. 3 Kent, 206; Wilcox v. Parmlee, 3 Sandf. Sup. C. R. 610.

The common law responsibility of a carrier may be abridged by the special terms of the acceptance of the goods; but these are exceptions which leave the common law rule in force as to all beside, and, it being the business of the carrier to bring his case

intervention of the *vis major*, as excuses the delay of the common carrier by water. In respect to the *time* of delivery, he is responsible only for the exertion of due diligence. In this particular, he stands upon the same ground with other bailees, and may excuse delay in the delivery of goods by accident or misfortune, although not inevitable, or produced by the act of God. But he is bound to exercise at least ordinary forecast in anticipating the obstruction; to exert the proper means for overcoming it; and to exercise due diligence in accomplishing the transportation so soon as it ceases to operate. In the meantime, he must not be guilty of negligence in taking care of the goods detained. If, however, the common carrier has been guilty of negligence, and the goods of the shipper are injured in conveyance, his acceptance of them does not bar his right of action. That fact, however, may be given in evidence in mitigation of damages.[1]

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distinctly within them, they are to be strictly interpreted. Excepted "dangers of the navigation" of a public canal are such as are incident to it when the trip is made in conformity to the public regulations, of which the carrier is bound to take notice; consequently damage from bilging in a lock which was entered in contravention of the rules, must be compensated by him. Atwood v. The Reliance Transportation Company, 9 Watts, 87; Hand v. Baynes, 4 Whart. 204; Fairchild v. Slocum, 19 Wend. 329; M'Arthur v. Sears, 21 Wend. 190; Rathborne v. Neal, 4 Louis. R. 563.

[1] Bowman v. Teall, 23 Wend. 306; Parsons v. Hardy, 14 Id. 215; Crosby v. Fitch, 12 Conn. 410; Baylis v. Usher, 4 Moore & Payne, 790; Willoughby v. Backhouse, 4 D. & R. 539; Sells v. Hoare, 8 Moore, 451. In the recent case of Morrison v. Davis, reported in the American Law Register (May No. 1853), p. 436,

304. The carrier is not excused for any loss arising from human action or neglect, or any combination of such action or neglect, except force exerted by a public enemy. No matter what degree of prudence may be exercised by the carrier and his servants; although the delusion by which it is baffled, or the force by which it is overcome be inevitable, yet if it be the result of human means, the carrier is responsible. Thus the owners of a steamboat were held liable for a loss occurring from a mistaken deviation, to which the master was led by a concourse of circumstances over which he had no control. The disaster happened to the vessel in an attempt to enter

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which was assumpsit against a carrier, it appeared that the defendant's canal boat, in which the goods were carried, was wrecked on the Pennsylvania canal, by reason of an extraordinary flood; that the boat had started on its voyage with one lame horse; *that by reason of this*, great delay had been occasioned in making the voyage; and *that had it not been for this*, the boat would have passed the point where the accident occurred. It was held by the Court (the Supreme Court of Pennsylvania), that the accident was not the ordinary or proximate result of the original negligence of the carrier, and consequently that he was not liable therefor. In cases of peril by extraordinary accident, the law requires of carriers, said the Court, ordinary care, skill, and foresight, to avoid the consequences likely to ensue.

It was held by the Court, that the usual exceptions in a bill of lading are *prima facie* to be implied, when omitted. And that in such a case, oral testimony connected with advertisements and circulars of the carrier is admissible to show that the latter had agreed to insure the safe delivery of the goods at all events and without exception, and that it is not necessary for the shipper to show that the advertisements had come to his knowledge before the time of the delivery of the goods. See Morrison v. M'Fadden, 10 P. L. J. 462.

the harbor of Erie. It was night, the weather was hazy, with flurries of snow. The beacon light, on the end of the pier, was seen occasionally through the flurries of snow. Besides the beacon light, there was usually a light at the window of the house of the keeper of the beacon light, bearing southwest, about fifty rods distant from the beacon light, and the usual way of steering into the channel was to bring the beacon light and the light in the keeper's house into a range, and take them as a guide in entering the harbor. A light was observed, which was supposed to be the light in the keeper's house, but which proved to be a light on board another steamboat, the North America, which had been driven ashore in a previous gale, and in navigating the vessel so as to bring in a range the two lights, that is, the beacon light and the light on board the North America, which was mistaken for the light in the keeper's house, the boat struck on a shoal. After she struck and got on the shoal, the wind blew hard, the sea ran high, and the vessel labored, strained, and pounded very hard, which made it necessary to throw the oysters overboard to save the vessel and cargo. It was proved that the master of the Columbus was one of the most competent masters of steamboats on the lake, and that the most prudent master might have run his boat ashore under the existing circumstances. It was held by the Court, that nothing will excuse the carrier but inevitable accident, without the intervention of man, and the acts of public enemies; that neither of the exceptions existed in this case; and that proof of the utmost vigilance and care on the part of the master was

irrelevant and inadmissible in defence of the action.[1]

305. The carrier will not be excused for a loss occurring from the breaking of a rudder, notwithstanding he shows that he had sent the vessel to be repaired by a skilful workman, who made the rudder, which was apparently sound, but in fact, internally rotten, of which defect, however, he was wholly ignorant.[2] When, however, the loss happens from the vessel being forced by the wind, or other and inevitable cause, against some permanent artificial object, as the pier of a bridge erected by another, in that case the carrier will be excused.[3] So too, he

[1] M'Arthur v. Sears, 21 Wend. R. 190. In this case, there was no exception in the bill of lading, and of course the defendant stood chargeable as a common carrier without qualification. In Story on Bailments, 334, s. 518, the doctrine there laid down would seem to militate against the doctrine of the text. Mr. Justice Story seems to suppose, that if an obstruction be secretly sunk in the stream, and not being known to the carrier, his boat founder, he would be excused. "But the cases," says Cowen, J., in M'Arthur v. Sears, *supra*, "do not appear to sustain him, unless the obstruction were sunk by the act of God, as by a sudden and extraordinary flood. This may change the position of the shore, raise a mud bar, or sink obstructions unknown to the approaching navigator. If it arise from ordinary causes, it would be otherwise, for the carrier undertakes against these. Should a navigator, by mistake, run against a snag in a river where such obstructions are known to abound, as in the River Hatchie, 4 Yerg. Miss. R. 49, whatever might be his care, he would not be excused without an exception in the bill of lading of dangers of the river. This, I think, is clearly collectible from the cases already cited of Johnson v. Friar, 4 Yerg. 48, and Gordon v. Buchanan, 5 Id. 71."

[2] Backhouse v. Sneed, 1 Murph. 173.

[3] Amies v. Stevens, 1 Str. 128; Colt v. M'Mechen, 6 Johns. R. 165; M'Arthur v. Sears, 21 Wend. R. 190.

will be excused, under the exceptions of "perils of the sea," when the loss arises from a collision without fault of either party.[1] In Smith v. Scott,[2] which was an action upon a policy of insurance, it was held, that a loss occasioned by another ship running down the ship insured, through gross negligence, is a loss by "perils of the sea."

306. Mansfield, C. J., said: "I do not know how to make this out not to be a peril of the sea. What drove the Margaret against the Helena? the sea! What was the cause that the crew of the Margaret did not prevent her from running against the other? their gross and culpable negligence! but still the sea did the mischief. It is reasonable enough that the plaintiffs should permit the defendant to use their names as plaintiffs against the owners or crew of the Margaret, so as to recover whatever the plaintiffs would be entitled to as against the Margaret, and to apply it in diminution of their loss; but it would lead to endless discussion, if it were required that no cause except the cause of loss alleged in the declaration should be conducive to the loss."

307. A collision occurring from the negligence of the injuring ship, is deemed, therefore, in the law of insurance, a peril of the sea, and the underwriters are held liable. Whether the carrier should be excused upon the same ground, viz., that the loss arose from a collision not in any manner imputable to him,

[1] Story on Bailments, sec. 512, 514; Buller v. Fisher, 3 Esp. 67.

[2] 4 Taunt. R. 125.

seems to be assumed by the text writers as settled law. But it is doubtful whether, upon strict principle, this is correct. Lord Kenyon, in Buller v. Fisher,[1] put his decision upon the ground that the misfortune happened without fault in either party.

308. When a ship was moored in a harbor, having a hard, uneven bottom, and being left by the tide at night, a noise was heard as of timber breaking, and on the reflux of the tide, there being a considerable swell in the harbor, she struck the ground hard several times, and in the morning several of her knees were found to be broken; this damage was held to be a loss by perils of the sea.[2] When a vessel runs aground without any fault of the master, but in consequence of a sudden failure of the wind, this will excuse the carrier for any loss thereby occurring. The failure of the wind is deemed to be inevitable accident.[3]

309. The destruction of a ship's bottom by worms in the course of a voyage, has been deemed not to be a peril of the sea, both in England and America, and upon the ground that it is a loss by ordinary wear and decay.[4] When damage is done to a cargo

[1] *Supra.* See Abbott on Shipp. 313; 3 Kent, 217.

[2] Fletcher v. Inglis, 2 B. & A. 315; Abbott on Shipp. 474; Potter v. Suffolk Ins. Co., 2 Sum. 197.

[3] Colt v. M'Mechen, 6 Johns. R. 160. It was held in the case of Boyce v. Welch, 5 Louis. R. 623, that when a steamboat loses a portion of her cargo in consequence of being snagged, the loss is considered as one falling within the perils of the river, and the vessel is not liable.

[4] Story on Bailments, sec. 513; Abbott on Shipp. 474; Rohl

by water escaping through the pipe of a steam-boiler, in consequence of the pipe having been cracked by frost, this is deemed to be a loss from negligence. It is well known that frost will rend iron; and if so, the master of a vessel cannot be justified by keeping water within his boiler in freezing weather. It is negligence to do so.[1]

310. If the master should fraudulently bore holes in the bottom of the ship, in order to sink her; or should fraudulently run her on shore, or fraudulently cut her from her moorings, and she should drift upon rocks; or he should fraudulently desert her at sea, whereby she should founder: in all these cases, if the cargo or freight is lost or damaged, the loss or damage must be borne by the owner of the ship; for it is in no just sense a loss by the perils of the sea.[2]

311. We may here observe, that a contract to forward goods from one place to another and distant place, subjects the party to liability as a common carrier for the whole route, although his own transportation line extends only a part of the distance,

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v. Parr, 1 Esp. 445; Martin v. Salem Ins. Co., 2 Mass. R. 429; Hazard v. New England Ins. Co., 1 Sum. 218; S. C., 8 Peters' R. 557. See, however, De Peyster v. Columbian Ins. Co., 2 Caines R. 85. As to losses by rats, see ante, p. 263, and Hunter v. Potts, 4 Camp. 203.

[1] Siordet v. Hall, 4 Bing. R. 607.

[2] Story's Bailments, s. 516; Waters v. The Merchants' Louisville Ins. Co., 11 Peters' R. 213.

and the loss occurs on a portion of the route in which he is not interested.[1]

312. We have observed in another place, that whatever care and diligence may have been shown in preparing a vessel for her voyage, and in rendering her staunch and strong, yet, if in fact she was not so, the owners will be responsible for any damage resulting therefrom to the shippers. And, therefore, where a vessel, in consequence of unseaworthiness existing at the commencement of the voyage, and

[1] Wilcox v. Parmelee, 3 Sandf. Sup. Ct. R. 610. The plaintiff in this case, purchased, in the city of New York, a quantity of merchandise, which the defendant undertook to forward from thence to Fairport, Ohio, by a written agreement, for fifty cents by vessel, and sixty-five cents per 100 lbs. by steam. Those goods marked "steam," to go by steam, and all other goods "to be shipped by vessel from Buffalo." Certain goods were marked to go by steam, but they were sent forward from Buffalo in a sailing vessel, and were lost in a gale on Lake Erie. It appeared that the defendant owned a line of boats on the canal between Albany and Buffalo, but that he had no vessels on Lake Erie. Held that the defendant, by the terms of his contract, was a common carrier from New York to Fairport, and not merely on the canal, and that he was liable for the loss.

In the recent case of Devillers v. Schooner John Bell, 6 Louis. 344, it was held, that where a vessel undertakes to transport merchandise from one place to another, giving a bill of lading in the usual form, in case a reshipment become necessary, she is bound to employ a seaworthy vessel. If the goods are lost in consequence of the unseaworthiness of the vessel on which they were reshipped, the vessel originally employed will be held liable for their value. But if she had only contracted to carry the goods from one point to another, from which latter place they were to be reshipped, the vessel is only liable as a forwarder of merchandise, and is only bound to exercise ordinary care in procuring a proper conveyance for the goods.

not from any perils of the sea or accident, is compelled to put into an intermediate port for repairs, where she is kept a much longer time than necessary to prepare her for the completion of her voyage, the owners will be responsible to the freighters for any damage resulting from the delay in the delivery of the cargo, occasioned by her unseaworthiness and unnecessary detention.[1]

313. A carrier is bound not only to transport the goods intrusted to him, safely, but to do so within a reasonable time, and he is bound to account for the value at the expiration of that time. It is as much a part of his contract as to deliver them in good condition; and in commercial adventures, time is one of the elements upon which they are undertaken, and controls their results. The consignee, in such a case, does not lose his right of action by receiving the goods and disposing of them. This may be considered in mitigation of damages, but the cause of action having accrued by the delay, the carrier is bound to make good the loss resulting from his neglect, and the acceptance of the goods is no bar to the action.[2]

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[1] Rathbone v. Neal, 4 Louis. R. 563.

[2] Ibid. See also, Bowman v. Teal, 23 Wend. R. 306; Hart v. Ship Jane Ross, 5 Louis. R. 264. In this latter case, it was held, that vessels are liable for loss and injury to goods shipped, occurring from improper delay in not sailing at the appointed time; but the amount of damage must be shown by evidence. It appeared at the trial, that the public advertisement and the private assurance to the shipper was of the most positive character as to the time of the vessel's sailing; but that these assurances were disappointed for the convenience and interest of the ship-owners.

314. A vessel is not liable for damages caused to goods from the "sweating of the hold," when the vessel has been supplied with proper ventilators. But even in that case, if the injury was in consequence of improper storage, the vessel will be held liable.[1]

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The vessel did not put to sea until about twenty days after the time promised. There was a good deal of testimony going to show that transient ships (as distinguished from packet ships), are usually wanting in punctuality, and that the public do not rely nor act upon what the agents of such vessels promise. But the Court said, that such evidence of usage should have little favor before tribunals of justice.

See the case of Holland v. Cammel, 5 Louis. R. 705, as to burden of proof, in actions against common carriers. The Supreme Court of Louisiana, in this case, assert the common and familiar doctrine, that when the damage is proved, then the carrier is bound to show that it did not happen on board the vessel, or whilst the goods were under his control and custody. See also, Montgomery v. Ship Abby Pratt, Id. 410.

[1] Montgomery v. Ship Abby Pratt, *supra;* Glover v. Dufour, 6 Louis. R. 490. In Boyce v. Welch, 5 Id. 623, it was held that a loss occurring from a steamboat being snagged, is a loss by a peril of the river, and the vessel is not liable.

## CHAPTER XIII.

### OF THE SEAMAN'S REMEDY FOR HIS WAGES.

315. The voyage performed, the mariner is entitled to his wages. We shall consider in this chapter the mode by which he may enforce payment, when they are withholden from him. Seamen are treated as wards of the Admiralty. It watches over their interests with peculiar care; it enforces their rights with a strong hand. Their service is a hard and hazardous one. Their compensation is small; but, such as it is, it is secured by all the protections of law. The mariner's claim for wages is preferred to all other liens, and is nailed to the last plank of the ship.[1]

[1] In the recent case of The Globe (The Law Rep., Dec. No., 1852), it was held that maritime liens against a vessel, for supplies and materials furnished to her master at a foreign port, were not of such an abiding character that they adhered to the vessel, and might be enforced over all claims of a like nature subsequently accruing in the course of her employment. "On the contrary," observed Judge Nelson, "I am satisfied that the true rule upon the subject is, that, in respect to maritime liens of this description, the party first instituting legal proceedings for the purpose of enforcing his claim against the vessel is entitled to satisfaction out of the proceeds of her sale. Upon any other view, the vessel would afford no reasonable security to the merchant in making advances or furnishing the necessary supplies; as, for aught he could know, the existing claims against her might exceed her value. It is apparent that, to give to this maritime lien the efficacy claimed would greatly embarrass and obstruct the commerce and navigation of the country. It would deprive the master,

316. In the case of The Thomas Jefferson,[1] it was held, that the Admiralty had no original jurisdiction

in distant ports, of the means of meeting the exigencies of the service, because the vessel would furnish no adequate security for the necessary supplies or repairs." In the case of The Triumph (decided by Judge Betts, in the District Court of New York for the Southern District, and reprinted in the same number of the Law Reporter which contains the report of the case of The Globe), it was held that the meaning and efficacy of a maritime lien is, that it renders the property liable to the claim without a previous judgment or decree of the Court, sequestering or condemning it, or establishing the demand, as at common law, and the action *in rem* carries it into effect. Thus, the appropriation of the *res* to that end becomes absolute and exclusive on suit brought, unless superseded by some pledge or lien of paramount order; and it accordingly results, from the nature of the right and the proceedings to enforce it, that the first action which seizes the property is entitled to hold it, as against all other claims of no higher character. The lien, so termed, is in reality only a privilege to arrest the vessel for the debt, which of itself constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment. These principles, laid down by Judge Betts, are quoted and assented to by Judge Nelson. It will be perceived that, upon the ground of these two cases, namely, that the maritime lien is only a privilege to arrest the vessel for the debt, it does not by any means follow that the privileged creditor who first enforces his privilege supersedes all prior liens. On the contrary, he only holds the property as against claims of the same grade. The material-man, having a lien upon a vessel, does not supersede the lien of a seaman for his wages because he first arrests the vessel. The lien of a seaman stands first in rank, and must be first paid. The seaman, however, who first arrests the vessel, according to the principle of the foregoing cases, will be preferred to his comrades on the same voyage, and his claim will be first satisfied. This doctrine is inapplicable to the case of bottomry bonds, because the last bond, according to the invariable practice of the Admiralty, takes precedence of all prior bonds. See The Royal Saxon, Wallace, Jr.'s, R. 311.

[1] 10 Wheat. R. 428.

of contracts for the hire of seamen, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. The jurisdiction existed, however, although the commencement or termination of the voyage might happen to be at some place beyond the reach of the tide.

317. It is a little more than a quarter of a century since this decision was made. The Judge who delivered the opinion of the Court, and all his brethren who sat upon the bench at that time, have passed away. They were cotemporary with the Revolution. Several of them, and especially the Chief Justice, the most eminent of them all, had participated in its stirring events. He in a pre-eminent degree was supposed to be familiar with the provisions of the Constitution. Neither himself, nor his colleagues upon the bench, ever evinced any disposition to unduly circumscribe its powers. On the contrary, in doubtful cases, they inclined to the side of power. Yet these men, coeval with the Constitution, familiar with its history and its framers, inclined to a large and liberal interpretation of its provisions, and acquainted, if any men could be acquainted, with the limits assigned by the Constitution to the judicial department of the government, —these men never supposed that the Federal Courts had Admiralty jurisdiction of causes arising beyond the ebb and flow of the tide. In the case of The Thomas Jefferson, they solemnly decided that the jurisdiction was bounded by that limit. But that case has been overruled; and it is now held by the

Supreme Court that the Admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different States, or with a foreign nation.[1] The opinion of the Court declaring this latter doctrine was delivered by Mr. Chief Justice Taney. His reasoning is bold, manly, and direct. He employs no evasions or disguises. He puts the decision upon the ground that the Act of 1845, extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same, is constitutional, because such lakes and navigable waters are within the scope of Admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted. The Chief Justice supports this proposition with force and ability. But he fails to make good his conclusions. As an argument showing the propriety and expediency of extending the Admiralty jurisdiction of the Federal Courts, it is satisfactory. But because a thing ought to be is no proof of its existence. The Chief Justice demonstrates that it is highly expedient and necessary that the jurisdiction of the Admiralty should extend over the interior waters of the country, and therefore concludes that it does extend over them. His reasoning makes out a case requiring an amendment of the Constitution. His conclusion, however, obviates the necessity of any dilatory process of that nature. It

[1] The Propeller Genesee Chief, 12 How. R. 443. See Act of February 26, 1845 (5 stat. at Large, 726).

is the duty of a lawyer to bow to the decisions of the Courts with the same submission and resignation with which a Turk yields his neck to the bowstring. In that spirit it behooves the Profession to submit to the doctrine of the Supreme Court in the case of The Propeller Genesee Chief.

318. According to the doctrine of this case, it follows that the Admiralty has jurisdiction of contracts for services rendered in the navigation of vessels upon the public navigable lakes and rivers of the country, where commerce is carried on between different States, or with a foreign nation. Congress has provided, however, that canal boats, navigated without masts or steam-power, shall not be subject to be libelled in any of the Courts of the United States for the wages of any person or persons who may be employed on board thereof, or in navigating the same.[1]

319. By the maritime law, the seamen have a lien on the freight, as well as the vessel, for their wages. Their lien arises *ex contractu*, and takes precedence of all other liens of that nature. Dr. Lushington, however, in the case of The Mary Ann,[2] expressed the opinion that a bottomry bond would take precedence of wages earned antecedently to the bond. "Suppose," he asked, "the wages sued for had been, in part, wages on the outward voyage, before the bottomry bond was taken; then would arise a question of no small importance, namely, whether these

[1] Act U. S., July 20, 1846, sec. 1. [2] 9 Jurist, 94.

wages would be entitled, as against the ship, to priority over the bottomry bond? I apprehend not. Doubtless wages earned subsequently to the bottomry bond would be entitled to priority against the ship." The same rule applies to the case of salvage, when it is of a meritorious kind, and it takes precedence, it seems, of the original or antecedent wages.[1] Salvage is privileged before the original or prior wages of the ship's crew, on the ground that they are saved to them as much as, or *eadem ratione quâ*, the ship and cargo are saved to their owners.[2]

320. The rule which gives salvage of a meritorious

[1] Selina, 2 Notes of Cases, 18, cited in the Law Reporter for May, 1853, p. 5. The article in this number of the Law Reporter, "On the Peculiarities of Maritime Liens," together with a preceding article upon the same subject, by the same writer, will repay a careful perusal. The Sabina, 7 Jurist, 182. "In liens *ex contractu*," observes the writer above referred to, "the preference or right of priority ostensibly depends upon the dates at which the liens have attached. For the rule by which that priority is determined, requires that the demand or service for which that privilege is claimed be posterior in date to other services or liens. The ground of this inversion of rule is just and obvious. In the hazardous trade of the sea, the services performed at the latest hour are most efficacious in bringing the vessel and her freightage safely to their final destination. Each foregoing incumbrancer, therefore, is actually benefited by means of the succeeding incumbrance, and the equity of the Court of Admiralty, in adjudicating cases of conflicting liens of this nature, takes that as the principle of its decisions. Subject to this comprehensive principle, in the first rank of liens *ex contractu*, are wages, pilotage, and towage. These take precedence of all other liens *ex contractu*, as being a remuneration for services performed in bringing a vessel safely to her haven."

[2] Law Reporter, *supra*.

kind precedence over prior wages, does not apply with equal force to a bottomry bond. The bond, it is true, may enable the ship to be repaired and prosecute her voyage; but it cannot be said that it preserves the ship and cargo to the seamen as much as to the owners. Because, in most instances, if not in every instance, a ship, which can be hypothecated upon bottomry, is of sufficient value in its present state to satisfy the claims of the seamen. The bond, therefore, does not enure to their benefit. On the contrary, if Courts of Admiralty postpone their claim for wages to the bond, the bond may have the effect to supersede their lien altogether, that is, if the bond should absorb the *res*. The question has been nowhere directly determined, and is open to discussion.[1]

321. While the lien for wages, with the exceptions which we have mentioned, takes precedence of all other liens arising *ex contractu*, a different rule applies to liens arising *ex delicto*. In cases of collision, if the guilty ship is insufficient to meet all demands, the lien of damage must be first satisfied. The principle upon which the Courts proceed in these cases, is based upon sound policy. The libellant, in a cause of damage, has suffered a wrong from the negligence, or *delictum*, of the master and crew of the vessel in fault. By giving him a preference of payment over

[1] With respect to any accretion in the value of the vessel by means of the repairs, the bottomry holder ought not to be postponed to the seamen's claim for wages. They are in justice only entitled to the value of the vessel before the repairs were commenced. See The Aline, 1 W. Rob. 119.

those who have done the injury, it will insure, or tend to insure, care and circumspection in the future.[1]

322. We have observed that the seamen have a lien upon the freight as well as the ship. But it is a principle of Admiralty practice, that when there are two creditors, the one having security on two species of property, and the other security upon one only, the Court will compel the creditor who has the double security so to resort to that as will enable the other, who has only a single security, to be paid.[2]

323. It is well settled in this country, that the master has no remedy for his wages against the vessel.[3] The rule, however, is an arbitrary one, and no satisfactory reason is assigned for placing him in a less favorable position than that occupied by the seamen. Both for his wages and his disbursements, he is entitled, in reason, to a lien upon the ship. The foreign ordinances, so far as I can discover, make no discrimination against him. On the contrary, the

[1] The Aline, 1 W. Rob. 119; Gazelle, 2 W. Rob. 281; Benares, cited in Law. Rep., *supra;* Bold Buccleuch, 3 W. Rob. 229. In the case of The Aline, *supra*, Dr. Lushington held, that when a vessel, run down by another vessel, had been repaired by means of a bottomry bond, the lien of damage did not extend to the subsequent repairs. The creditor was entitled to the value of the vessel before the repairs were commenced, and to that portion of the repairs which was done after the arrest took place.

[2] The Mary Ann, 9 Jurist, 44.

[3] The Brig Spartan, Ware's R. 161; Steamboat Orleans v. Phœnix, 11 Peters' R. 184; The Grand Turk, 1 Paine's R. 73; The New Jersey, 1 Peters' Ad. R. 228; 2 Id. 397; S. C. 1 Dall. R. 49; The Ship Packet, 3 Mason's R. 255.

French codes allow the master the same privilege against the ship for his wages, and in case of misfortune, against the savings from the wreck, as the seamen.[1] This provision of the French law has its basis in justice and sound reason. It is to be hoped that the principle of it will be engrafted into our American law.

324. Judge Ware, in the case of The Brig Spartan,[2] took one step towards this desirable result. In that case, he sustained a libel, containing an allegation by the master, claiming a lien on the freight for his wages. There is no question of the master's right to sue *in personam*, in the Admiralty, for his wages, as well as for disbursements and advances, made by him on account of the ship.[3] Payments, too, have been allowed to masters for advances and necessary disbursements abroad, out of remnants and surplusages arising from the proceeds of a sale of the ship in their hands, and this upon the ground that they partook of the nature of liens.[4]

325. The lien of seamen, for the whole compen-

[1] Ord. de la Marine, L. 3, tit. 4, arts. 8 and 21; Code de Commerce, 352. See, also, 7 & 8 Vict. c. 112, s. 16.

[2] *Supra*. See, also, Goodrich v. Lord, 10 Mass. 487; Lane v. Penniman, Id. 92; White v. Baring, 4 Esp. N. P. R. 22; Roccus, n. 31.

[3] The Ship Packet, 3 Mason's R. 255; The George, 1 Sum. 151; Hammond v. Essex Fire and M. Ins. Co., 4 Mason, 196; The Brig Spartan, *supra*; Sheppard v. Taylor, 5 Peters' R. 675, 711; Fisher v. Willing, 8 S. & Rawle, 118; The Steamboat Orleans, 11 Peters, 175; Case v. Woolley, 6 Dana, 22; 2 Brown. Civ. and Adm. Law, 95; 1 Dall. 98.

[4] The Ship New Jersey, 1 Peters' Ad. R. 223.

sation due to them, attaches to the ship, and to whatever is substituted for it. Hence where a ship was captured, and afterwards restitution in value was made, it was held, that the lien reattached to the money substituted for it. This doctrine is founded upon the principle, that the owner and the lienholder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them.[1] The seamen being entitled to enforce their claim against the goods taken on freight, may likewise proceed against the goods of the owner, or charterer of the ship. The nature of their service is the same, and their lien adheres to the goods, whoever may be the owner. The merchandise is hypothecated to the wages to the amount of freight due upon it, and the merchant is not entitled to receive his goods until the lien is discharged.[2] The lien of the mariner is not upon the

[1] Sheppard v. Taylor, *supra;* Vandever v. Tilghman, Crabbe's R. 66.

[2] Poland v. The Freight and Cargo of Brig Spartan, Ware's R. 146; Skolfield v. Potter, Davies' R. 392; Brown v. Lull, 2 Sum. 443. It was said in the case of Sheppard v. Taylor, *supra*, that "the cargo is not in any manner hypothecated or subjected to the claim of wages." This was a mere *dictum*, and the point was not necessarily involved in the cause. (See the next note.) In Sheppard v. Taylor, the owner of the ship was also owner of the cargo. There had been an award allowing the assignees freight, as a distinct item; and the owners were insolvent. If the master were living, he would have, the Court said, a direct lien upon the freight for his disbursements, and liability for wages; and through him the seamen would have the means of asserting a claim on it. "We can perceive no principle then," observed Judge Story, delivering the opinion of the Court, "why, in the present case, the seamen may not justly assert a claim on the freight; if the pro-

cargo as cargo, his lien is upon the ship and on the freight as appurtenant to the ship; and so far as the cargo is subject to freight, he may attach it as a security for the freight that may be due.[1]

326. This lien of the seamen takes precedence of bottomry bonds and all other claims, whether the entirety of the fund out of which they are to be paid, remains, or a part of it is lost by accident or otherwise.[2] It may be enforced against the freight by seizing it in the hands of the master, or in the hands of the merchant before it is paid.[3] Those

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ceeds of the ship are exhausted, without satisfying the amount of their wages. No authority has been produced against it; and we think it justly deducible from the general doctrines of the maritime law on this subject." See Pitman v. Hooper, 3 Sum. R. 50.

[1] The Lady Durham, 3 Hagg. Ad. R. 200; Conkling's Admiralty, pp. 75, 76; Skolfield v. Potter, Davies R. 392. "It may be true," said his honor Judge Ware, in this case, "that the cargo is not directly, but it certainly is indirectly bound for the wages. For it is a first principle of the maritime law that the cargo is bound to the vessel for the freight, and another equally ancient and undoubted, that the freight is pledged for the wages. Indirectly, therefore, to the amount of the freight due upon it, the cargo is bound for the wages. The master is not obliged to deliver it until the freight is paid or secured, and if not paid, he may sell so much as is necessary to pay the freight. The seamen may, therefore, indirectly, through the master, proceed against the cargo itself, for their wages, to the amount of the freight due. When the owners of the ship are the owners of the cargo, the seamen's claim on the freight can be enforced in no other manner but through the merchandise; *and I see no objection in principle or convenience, to allowing the seamen to do that directly in their own name, which they may do indirectly through that of the master.*"

[2] Pitman v. Hooper, 3 Sum. R. 50; Skolfield v. Potter, Davies' R. 392; ante, secs. 323, 324.

[3] Poland v. The Freight and Cargo of the Brig Spartan, Ware's

who impugn the validity of the general rule as to the extent and priority of a seamen's lien, are bound to show that the exception upon which they rely, is one well founded. There is no doubt that as against the owners of the ship themselves, the mariners have a perfect right to be paid out of the ship and freight, even if the wages were earned in two or three preceding voyages. But whether they would have a similar right as against the owners of the cargo, is not so clear. We mean for the antecedent voyages.

327. It seemed to be the opinion of Dr. Lushington, in the recent case of The Louisa Bertha,[1] that they

R. 134. It was held, in the case of Holmes v. Bigelow, 3 Desaus. R. 497, that seamen libelling and selling the ship, have no right to resort to the cargo for payment of the balance of their wages. They must sue the captain or owners at law. This decision proceeded upon the wholly erroneous notion, that the seamen had only a lien upon the ship for their wages, and having exhausted that, they had no other recourse but their remedy at law, viz., an action against the captain or owners. Whereas, as we have seen in the text, the cargo is subject to the lien of the seamen, to the extent of the unpaid freight, and can be proceeded against by process *in rem*.

[1] 1 Eng. Law. & Eq. R. 669. This was a suit for wages, promoted by the mate and seven seamen of the Prussian ship Louisa Bertha, against the ship and freight, in which an appearance was given by the owners of the cargo, who prayed to be heard on their petition, in objection to the payment out of the proceeds of the sale of the ship and freight, of a portion of the wages scheduled, until after a bottomry bond upon the said ship pronounced for in this Court, and the costs of establishing the same, should have been satisfied out of the said proceeds and freight. The act on petition alleged, that the ship sailed from Memel, in March, 1848, with a cargo, which she discharged upon payment of freight at her port of destination; that in the years 1848 and 1849, the ship made other voyages, and carried considerable

would have no such right. In that case, the wages were earned, under a continuous contract, binding the mariners to remain on board the ship, whatever

freight, and in November, 1849, sailed from Alexandria, bound to a port in Great Britain and Ireland, or to a port between Havre and Hamburgh, calling at Cork or Falmouth for orders, in the course of which voyage, the master, for securing the re-payment of a certain sum of money, with the maritime premium thereon, executed the said bottomry bond, binding the ship, cargo, and freight; that the ship having arrived in England, the holder of the bond arrested the ship, cargo, and freight; that bail was given on behalf of the owners of the cargo, so far as regarded the cargo and freight, but no appearance being given for the ship, she was sold by authority of the Court, and the proceeds, 697*l.* 5*s.* 8*d.*, subject to deductions to the extent of 30*l.* or 40*l.*, brought into the registry; that the freight due for transportation of the said cargo, was 303*l.* 8*s.* 9*d.*, but that the said sums of 697*l.* 5*s.* 8*d.*, and 303*l.* 8*s.* 9*d.*, were not sufficient to pay the sum of 1002*l.* 8*s.* 11*d.*, secured and due upon the said bond, a portion of which, and all expenses incurred in recovering the same, would have to be paid by the owners of the cargo. The act then alleged, that the greater part of the wages sued for and set forth in the schedule, was earned in voyages preceding the voyage in which the said bond was granted, and if well earned, might be recovered against the master and against the owners of the ship; whereas if the whole of such wages be decreed to be paid out of the proceeds of the ship and freight, a corresponding portion of the said bond would have to be paid by the owners of the cargo, who would have no means, at law or in equity, of recovering the same, or any portion thereof. The owners of the cargo contended that they ought to be relieved from that burden, and the seamen, instead of being paid from the ship and freight, should be left to take their remedy against their masters or owners in a foreign country; except, indeed, that they admitted that they could not successfully resist the payment of wages from Alexandria to England, the voyage in which the bottomry bond was given. Dr. Lushington, upon the ground that the voyage was a continuous one, upheld the lien of the seamen, or rather, overruled the prayer of the owners of the cargo.

might be the number of voyages, until the return of the vessel to the port of shipment. "I consider," said Dr. Lushington, "that the seamen, in pursuance of the contract, were not at liberty to quit the ship, and that they have a claim as a lien against the ship and freight. It is said that great injustice will be thus done to the owners of the cargo. I am not prepared to say that it is so, because, when they shipped the cargo, they might have ascertained whether the ship had been out a considerable time, and whether she had on board a crew which had been earning wages. It appears to me, that under these circumstances, I should be doing injustice to the seamen if I were to depart from the general rule, that wages are a lien on the ship. I do not say, that that is a rule never to be broken down. I shall not depart from it in this case."

328. It is a well-settled doctrine of the maritime law, that seamen have a triple security for their wages, the vessel, the owner, and the master. And the owner, although his name may not be stated in the shipping articles, is nevertheless liable for the wages of the seamen. The law will not presume, because the name of the owner may not be set out as a party to the contract, that the mariner has, therefore, consented to give up his liability and abandon the rights conferred on him by the law. The owner is bound, not by any direct or express covenant or promise in the written contract, but by the decree of the law, named or not named, declared or concealed.[1]

[1] Bronde v. Haven, 1 Gilpin's R. 593.

329. And the sale and transfer of a vessel and freight, does not discharge the owner from his responsibility to the mariner, and pass him over to whoever may be the owner when the wages are demanded. A party to a contract cannot withdraw himself from it at his pleasure, and put a substitute in his place to fulfil his engagements.[1] The owners of the vessel are liable for the wages of a seaman, employed by the master, notwithstanding he may have had a complement of men without him. The master of a ship has authority to employ mariners,

[1] Bronde v. Haven, 1 Gilpin's R. 593. The opinion of Judge Hopkinson, in this case, upon the point stated in the text, is, we think, conclusive. He says, "We have here a clear, unquestioned contract, made by the master of the vessel, the agent of her owner, binding personally upon both; the owner being the principal party in interest, and responsible to the seamen for all his rights under and by the contract. Can a party to this contract change and perhaps destroy the security on which the other party relied, turn him over to a stranger without his consent, and leave him to learn it for the first time, after his services have been rendered, and his engagements performed on the faith of the contract as he made it? He proceeded on the voyage on the confidence he gave to the contract, and to the parties who were responsible to him for it. After months or years of hard and faithful service, the vessel is wrecked, so that he has no fund then for the payment of his wages; the master, who in truth, is seldom much considered as a security, is ruined by the disaster; and when the seaman comes home to the place where his contract was made, to the owner of the vessel, who was his owner and his party, he is told by him that he has sold the vessel to a beggar or a merchant in Russia; that all his engagements and responsibilities went with the ship and her freight; and that the mariner must follow them for his wages. There is something to my notions of justice so shocking in such a reply to such a demand, that, unless I am bound by some authority I may not resist, I can never yield to it." Vide, Aspinwall v. Bartlett, 8 Mass. R. 483; Brooks v. Dorr, 2 Mass. R. 39.

and the person employed is not bound to inquire whether he has already a full crew.[1]

330. When it is said that seamen have a threefold remedy for their wages, namely, against the ship, the owners, and the master, it must be understood that the master is chargeable only on his special contract in hiring the seamen. The action against him arises solely from the obligation which he contracts by such hiring; and the action against the owners arises from the implied contract which they are supposed to have made through their agent, the master. It was said, in Wysham v. Bosser,[2] that the only case in which it can be supposed that a new or substituted master assumes the contract, is, when he takes upon himself the original voyage. To carry his responsibility further, the Court thought would be unprecedented, and of dangerous consequence.

331. The substituted master may not, and probably does not assume in terms the original contract; but would not the law imply, and justly imply, that by the very act of assuming the command of the vessel, he thereby assumes the contract? The owner may change the master whenever he pleases, and at any stage of the voyage, and that is not a dissolution

[1] Luscom v. Osgood, District Ct. of the U. S. for Mass., 7 Law Rep., 132. Vide, the Act of Congress of 1790, ch. 29, s. 6, and the Act of 1813, ch. 2, expressly providing that seamen, those engaged in the bank and cod fisheries, as well as those employed in the merchant service, may proceed against the ship in the Admiralty.

[2] 11 John. R. 72; Mays v. Harding, 6 Mass. R. 300.

of the shipping articles as to the seamen. It is important to the seamen that the captain be known to them, and one on whom they may depend for their wages. But if the master may be changed at any moment, in the progress of the voyage, as he may be, and at a time when the wages of the seamen may not be due, and when of course they cannot commence proceedings against the original master upon the original contract for the services already rendered,—if they have no claim upon the substituted master for those services, then they are practically deprived of one of the remedies given them by the law.

332. The substituted master receives the freight, the very fund upon which the seamen rely, and which the maritime law regards as specially entitling them to payment. "If, then," inquires Mr. Curtis, "a substituted master had earned freight, and had actually received it, or might have received it, to be applied to the claims of the seamen, would he not be deemed to have assumed the whole of the original contract, so as to be personally liable for the wages earned before, as well as those earned after his accession to the office? It is certain that the maritime law contemplates freight as the trust fund for the payment of wages, and some of the older authorities direct the master positively in regard to the payment of their claims out of it. If he had actually received the freight, and neglected their claims, he would at least be liable as the holder of a fund out of which they are entitled to be paid by priority. Whether the opportunity to have received it would

raise an implied contract with the seamen for the whole, is a question deserving of consideration."[1]

333. In the case of Bray v. Ship Atlanta,[2] Judge Bee seemed to regard it as a settled point, that the new master would be liable upon the original contract. "As to the change of captain," he observed, "I do not think it justifies the seamen in leaving a ship, after they have signed articles to proceed on a definite voyage; for, although the contract is made with the captain, yet it is chiefly on the credit of the vessel that they depend for their wages. And if the vessel be lost, it cannot be said that they would have a claim on the captain personally. *The captain, may die, or be dismissed by the owners, after articles signed; but this would by no means discharge the seamen. The vessel, the owners, and the new captain would be liable to their claim for wages, and as contracts are mutual, they are also bound.*"

334. The question has arisen in the Courts of this country, whether upon an abandonment by the owners to the assurers, the remedy of the mariners for their wages lies against the underwriters, or against the former owners. The decisions have gone upon the principle, that the transfer of property in freight from owners to underwriters does not affect the contract between the ship-owners and freighters, nor does the transfer of the ship (the freight follows as an incident the property in the ship, and, there-

[1] Merchant Seamen, p. 328.

[2] Bee's R. 48. See, also, U. S. v. Ruggles, 5 Mason's R. 192.

fore, as between the respective underwriters on ship and freight, an abandonment of the ship carries the freight along with it) between the same parties, affect the mariners' contract. The underwriters, upon a valid abandonment, do not, in consequence of that act, become personally liable to the seamen for their wages. They have a right to look to the original owners, with whom they contracted, and whose responsibility they know.[1] It was held, however, in the case of M'Bride v. Mar. Ins. Co.,[2] that if the underwriter accepts the abandonment, the subsequent wages will be chargeable to him, as owner, and not as insurer. This doctrine seems in accordance with the general current of decisions, and was adopted by Judge Story in the case of Hammond v. Essex Fire and Marine Ins. Co.[3]

335. It is not only for wages earned in the course of a voyage that seamen may sue in the Admiralty, but also for wages earned in rigging and fitting out a ship for a voyage, on which they have engaged to proceed, but which the owners abandon. Thus, in the case of Parry v. The Peggy,[4] the promovents had agreed for monthly wages, for a voyage to the West

[1] Brooks v. Dorr, 2 Mass. R. 39.

[2] 7 John R. 431. Vide, also, Hammond v. Essex Fire and M. Ins. Co., 4 Mason's R. 196.

[3] Ibid.

[4] 2 Brown. Civ. and Adm. Law, 533. In the case of Hynes v. Kirkman, 4 Louis. R. 17, it was held, that when the master of a steamboat is employed by the year, and is compelled before the expiration of the year to abandon the boat, in consequence of the illegal conduct of one of the owners, he is entitled to full wages, and may claim them from all or either of the owners.

Indies. They worked on board the ship for some days in the harbor of Dublin; afterwards Mr. Maguire, the owner of the ship, having changed his mind, determined to alter the voyage, and to postpone the sailing of the ship, whereupon the seamen were dismissed without their wages, who now libelled against the ship. The surrogate of the Admiralty decreed for the seamen, on the reason of the thing, and the authority of Mills v. Osmond.[1]

336. It was held by Dr. Lushington, in the case of The City of London,[2] that a mariner discharged from a vessel after the articles had been signed, but before the commencement of the voyage, was entitled to proceed in Admiralty in a suit for wages, the voyage for which he was engaged having been prosecuted. He adopted in this case as the measure of damages the whole wages of the voyage, deducting therefrom his earnings in other ships in the intermediate time. But he said he was disposed to accede to the position, that if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage, for which such seaman has been engaged, he would not be entitled to sue in Admiralty, but must seek his remedy at common law by an action on the case. In such a case, he said there would be nothing to show the real amount of loss sustained. The question would strictly be a question of *quantum meruit*, and if a Court of Admiralty was to take upon itself to adjudicate upon the quantum of damage sustained, it would be usurping the func-

[1] 2 Shower, p. 238; Abbott on Shipping, 784.
[2] 1 W. Rob. R. 88.

tions of a jury, to whose consideration the point in question is more peculiarly referable. Why the Courts of Admiralty are incapacitated to determine a question of *quantum meruit*, when the contract is maritime in its nature, is not readily perceived. I am not aware that the point has directly arisen in this country, but our Courts of Admiralty do not hesitate to exercise the functions of juries in maritime cases.

337. The Admiralty and maritime jurisdiction of the Federal Courts, extending, according to the doctrine of The Propeller Genesee Chief,[1] to all the public navigable lakes and rivers of the country, where commerce is carried on between different States, or with a foreign nation, it remains to be observed, that although the place where the services were performed may be within such jurisdiction, another element is essential to enable the party to sue there. The services must have been maritime services, that is, relating to the business of commerce and navigation. If the vessel in which the wages were earned was occupied in the business of trade and commerce, in a liberal and fair meaning of the terms, in which is not included the petty traffic of market or ferry boats, and other services of the same description, then the mariners may sue in the Admiralty.[2]

338. Where the voyage has been performed, and the wages of the seamen have been paid them up to

[1] 12 How. R. 443.

[2] The Farmer, 1 Gilpin's R. 532; Smith v. The Pekin, Id. 203.

its termination, they cannot sue in the Admiralty for services rendered on board the vessel whilst moored at the wharf. Those services are performed on a contract, which is neither made at sea, nor for a service to be performed at sea. The services have no agency in bringing her into port; she is not earning freight.[1] No lien exists in the Admiralty for services performed by a stevedore in loading and storing the ship's cargo. Stevedores are usually employed by the owner, consignee, or master, on their personal credit. The service performed by them is in no sense a maritime service, being completed before the voyage is begun or after it is ended. They are, therefore, no more entitled to a lien on the vessel, than the draymen and other laborers who perform services in loading and discharging vessels.[2]

339. It was held by Lord Stowell (then Sir William Scott) in the case of The Lord Hobart,[3] that a post-office packet may be arrested in a suit for mariner's wages. He said, however, that a proceeding of that sort should not be resorted to without giving due notice to the officers of the Post-office, and for the very obvious reason, that great inconvenience must arise from the detention of vessels engaged in a public service of that description. Upon being informed by the registrar, that notice had been given

[1] Phillips v. Scattergood, Id. 3.

[2] M'Dermott v. The S. G. Owens, Wallace, Jr.'s, R. 370.

[3] 2 Dod. R. 100. Where a vessel is seized by revenue officers, the mariners discharged, the vessel sold during seizure by her owner, and afterwards liberated, the lien of the mariners for wages is not destroyed. The Solon, Crabbe's R. 17.

in other cases of the same kind, and that the reply was that no objection existed on the part of the Post-office to the exercise of the jurisdiction, he said *that* disposed altogether of the objection, and left him at liberty to decide upon the question before him in the same way as he would in the case of any other ship.

340. Upon the same ground, namely, of public inconvenience, indeed of public danger, the Admiralty would have no jurisdiction *in rem* of mariner's claims for wages earned whilst serving on board of public ships of war, foreign or domestic. At all events, that would be a sufficient reason for the Admiralty to refuse to entertain jurisdiction in a case of that sort, if it otherwise possessed it. But, in point of fact, upon other and absolutely conclusive grounds, it has no such jurisdiction at all. Because the wages of the seamen, earned on board a public ship of war, are a debt against the government, and the government cannot be sued.[1]

341. But it is different if the wages were earned whilst employed on board of letters of marque ships. Because they are private ships, fitted out by private persons, and the obligations they contract are private obligations, to be maintained and enforced like other private obligations.

342. In proceedings *in rem*, the proper forum is the *locus rei sitæ*. A proceeding, therefore, *in rem*

[1] Ellison v. The Bellona, Bee's R. 112; De Moiter v. The South Carolina, Id. 422.

may be maintained in our Courts, when the property of a foreigner is within our jurisdiction. With regard to the contracts of seamen for wages, our Courts have proceeded upon the ground that, when they been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, a foreign Court may well entertain jurisdiction of them. But when, on the other hand, the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, then it is the duty of a foreign Court to decline any interference, and remit the parties to their own tribunals for redress.[1]

343. The reason of the distinction acted upon in these cases by foreign Courts is satisfactorily stated by Judge Peters, in the case of The Ship Catharina.[2] "There are," he says, "in most nations concerned in commerce, municipal and local laws relative to contracts with mariners, and other maritime covenants and agreements; though the great leading principles, or outlines, are in all nearly the same. On this account, among others, I have avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen are concerned. I have, in general, left them to settle their differences before their own tribunals. On several occasions, I have seen it a part of the contract that the mariners should not sue in any other than their own Courts; and I consider such a contract lawful. It would be against law, and void, if it were, that the mariner

[1] The Jerusalem, 2 Gallison's R. 198.

[2] 1 Peters' Adm. R. 104.

should not sue in any case, or that he should not sue in the proper Court or Courts of his country. But when the voyage of a foreign ship ended here, or was broken up, and no treaty or compact designated the mode of proceeding, I have permitted suits to be prosecuted. In such cases, I have determined according to the laws of the country to which the ship belonged, if there existed any peculiar variance or difference from those generally prevailing. I have seldom found any very material difference in principle."[1]

344. The jurisdiction of the Admiralty over suits for mariner's wages is not affected by the circumstance that the agreement upon which the suit is founded is a sealed instrument. Judge Story, in alluding to this point in the case of Harden v. Gordon,[2] said that the distinction between a special agreement and the ordinary agreement, as a foundation for jurisdiction in cases of seamen's wages, had always appeared to him to be little more than solemn trifling and evasion. The principle adopted by our Admiralty Courts is, that if they have jurisdiction of the subject-matter, they will follow it out over the incidents. It was formerly supposed that mariners could not sue in the Admiralty, if their contract contained any unusual covenants or stipulations. It was said that if the contract for service be made upon terms and conditions differing from

[1] See, also, The Nancy, Bee's R. 217; The Forsoket, 1 Peters' Ad. R. 197; The St. Oloff, 2 Peters' Ad. R. 428.

[2] 2 Mason's R. 544. See also The Fair American, 1 Peters' Ad. R. 92; De Lovio v. Boit, 2 Gallis. R. 398.

the general rules of law, the service alone could not entitle a mariner to his wages. His right, then, must depend upon the performance of the stipulated terms; and the construction of the instrument containing those terms was a proper subject for the jurisdiction of the Courts of common law. But such narrow and confined views of the powers of the Admiralty have, happily, never been entertained in this country. The construction of a written instrument is a proper subject for every Court having cognizance of the subject-matter; and in American jurisprudence this rule is held to be equally as applicable to the Admiralty as to any other Court.[1]

345. The primary security of the mariner for his wages is the lien which the law gives him upon the vessel. His claim, after the expenses of justice necessary to procure a condemnation and sale, and such charges as accrue for the preservation of the vessel after she is brought into port, holds the first rank, and is to be first paid.[2] If the voyage is an illegal one, no wages are payable, nor can be recovered in any Court of law; and therefore, in such a case, there can be no lien.[3]

346. With regard to the enforcement of the mariner's lien, there is no fixed time within which it must be done. As with other maritime liens, so

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[1] De Lorio v. Boit, 2 Gallis. R. 398.

[2] The Paragon, Ware's R. 330; 1 Valin's Comm. 362; Code de Commerce, No. 191; Consulat de la Mer, Ch. 138.

[3] The Langdon Cheeves, 2 Mason, 58; The St. Jago de Cuba, 9 Wheat. R. 409.

with this: a Court of Admiralty will require vigilance in parties who seek its aid, and will not sit to enforce stale and dormant claims. If a privileged creditor remains silent, after having had a proper opportunity to enforce his lien, and suffers the vessel to be sold to a purchaser without notice of the claim, he will be considered as waiving his rights, and as relying on the personal responsibility of the master and owner.[1] The simple fact that the vessel passed into other hands, after the lien accrued, without any laches on the part of the seaman, will not operate to defeat his lien; nor will such be the effect, under the same condition, if the vessel makes one or more voyages.[2]

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[1] The Eastern Star, Ware's R. 186, 212; Bee's Adm. 86.

[2] 3 Kent, 197; The Mary, 1 Paine, 180; The Margaret, 3 Hagg. R. 238. In the case of Packard v. The Louisa, 2 Wood. & M. 48, Judge Woodbury held, that there is no fixed time for liens to expire which exist at common law, except the time of parting with the possession, and none in maritime liens, when possession does not exist with them exclusively, *except the end of the next voyage*, or the intervention, after it, of rights by third persons without notice. "The claim of a seaman for wages on the vessel," he observed, "is a species of lien upon an article, which he should not long forbear to enforce, or it may become inequitable. Having assisted to keep in repair, and navigate and use her for purposes profitable to the owners, and having been so attached to it by a contract or shipping-papers, and having been exposed to all the risks, and toils, and responsibilities of a seaman in her, he is allowed a privilege to charge and hold her for his payment. But all analogies show that the claim, if renewed after being long abandoned, will mislead the public, as well as the owners, and embarrass commerce and sales, through secret and unknown and unrecorded outstanding claims. Maritime liens are not, like common law liens, limited to possession. Indeed, exclusive possession seldom accompanies them at all. But they

347. Nor does he lose his lien on the vessel for his wages by taking an order on the owner or charterer for the balance due at the close of the voyage.[1]

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are claims *in rem*, or charges *in rem*, having priority, and are to be seasonably enforced, else they may work great fraud in the community when possession is not taken or retained, and no public register or record is made of them, and the property thus secretly encumbered is allowed to depart, it may be, again and again, to the opposite side of the globe." See also The Nestor, 1 Sumner's R. 87; Ex parte Foster, 2 Story's R. 145; Acts U. S. of July 20th, 1790, and June 19th, 1813; The Rebecca, Ware's R. 212.

In the case of The Sloop Solon, Crabbe's R. 17, it was held that a libel will be sustained, though the vessel has made a second voyage since the cause of libel accrued, if, by her sudden departure, the prosecution of the claim was previously prevented. And in the case of The Schooner Jane, Id. 178, where a seaman, shipped for a part of a voyage, was discharged at the termination of his engagement, without payment of wages, it was held that, in such a case, if the seaman makes every exertion to follow up the vessel, and, immediately upon meeting her, commences proceedings against her, his lien for wages is not destroyed, though the vessel has made one or more voyages since his discharge.

In Holmes v. The Lodemia, Id. 434, Judge Hopkinson decided that a forbearance to sue for nine months, even if the libellant was on the spot, and the vessel within the power of the Court during that time, does not raise a presumption of payment, either in the Admiralty or any other Court. The mere fact that a plaintiff in the Admiralty, or in any other Court, has discontinued his action, is not a bar to a subsequent suit.

[1] The Eastern Star, Ware's R. 185. This was a suit *in rem* for seamen's wages. It was not disputed that the services had been performed, or that there was a balance due to the libellants. At the time when the contract was made with the seamen, the vessel was owned by Mr. Houdlette; a few days after, she was conveyed to Mr. Amory, as security for a debt which Houdlette owed him, but the vessel remained under the direction of Houdlette, and was employed for his benefit. On her return from her voyage, the master ascertained the balance of wages due, and gave

The general doctrine is, that if, by the local law, the acceptance of a negotiable security for a pre-existing debt by simple contract is held to be payment, and an extinguishment of the original cause of action, then the acceptance of such security by a privileged creditor will defeat his lien. Judge Ware, however, in the case of The Betsey and Rhoda,[1] qualified the general doctrine, so far as it is applicable to the claims of seamen, and held that, to operate as a waiver of their privilege and an extinction of their lien, it should, in the first place, be distinctly stated to them that such would be the result of the acceptance of the negotiable security, and also (such was the inclination of his mind) that the note should be accompanied with some other security, in addition to the personal liability of the owners, as an equiva-

to each of the men an order on Houdlette for the amount. The master, whose deposition was taken, stated that these orders were not considered by him as payment, but mere memorandums, showing the amount due, and that they were so considered by the seamen. They were presented, and not paid; but a verbal promise was given to pay them when Houdlette should receive the proceeds of the sale of the cargo. On this promise, the seamen delayed to enforce their claims, and the vessel proceeded on another voyage. The right of the seamen to recover against the vessel was objected to on two grounds: 1. That the orders given on Houdlette were to be treated as bills of exchange, and that the acceptance of these was a discharge of their lien on the vessel; 2. That the lien was lost by neglect to enforce it in due season. But Judge Ware held that the reasonable construction of the drafts, and the one conformable to the intention of the parties, was that they were mere memorandums, showing to the merchant the balance of wages due and unpaid; and their receiving them was not a waiver of any of their rights against the vessel or the master or owners.

[1] Davies' Adm. R. 112.

lent and a compensation for the discharge of the lien. The lien of seamen's wages exists in all cases as much against the government, becoming proprietors by way of purchase, or forfeiture, or otherwise, as it does against the particular things in the possession of a private person.[1]

348. The master of an apprentice may recover his wages, whether taken on board with or without his assent. In the case of Eades v. Vandepert,[2] the apprentice had been impressed, and detained on board the defendant's ship, which was a man-of-war. The only witness to charge Captain Vandepert with knowledge was the apprentice boy himself, who swore that, after he had been impressed and carried on board the ship, he told the defendant, the captain, that he was an apprentice, and required his discharge, which was refused. It was held that this evidence was sufficient, and that the captain ought to have made inquiry into the truth of what the boy said; for after that information he detained him at his peril; and it was admitted that, if the indentures had been produced, the defendant would have been bound to have discharged the boy.

349. The owner of a slave may likewise maintain an action for his wages; and the contract must be construed with reference to the *lex loci contractus*.[3] If the slave should desert during the voyage, neither

[1] United States v. Wilder, 3 Sum. R. 314.

[2] 5 East, 39, note.

[3] Stone v. Godet, Bee's Adm. R. 95; Emerson v. Howland, 1 Mason, R. 45.

the master nor owner of the ship would be responsible to his owner for the loss. In the case of slavery, as to rights and remedies, the owner is substituted by the law in lieu of the slave.[1]

350. In suits where the mariners have a common interest in the point in contest, they are nevertheless permitted to testify for each other. The fact would work strongly against their credit, but it does not affect their competency.[2] But where they are directly interested in the event of the suit, their testimony is rejected.[3] The master is personally liable for wages, though the seamen may proceed *in rem*

[1] Stone v. Godet. Bee's Adm. R. 95; Carey v. The Betty, Ibid., 255.

[2] Spurr v. Pearson, 1 Mason, R. 104; Hoyt v. Wildfire, 3 John. R. 518. Upon this point the common, civil, and maritime law, agree. Judge Peters, however, was in the habit of rejecting the testimony of mariners in suits where they were interested in the question, although not in the event of the suit. In the case of Thompson v. The Ship Philadelphia, 1 Peters' Adm. R. 210, he thus stated the principle upon which he proceeded: "On the point of admitting seamen to be witnesses for each other, it is settled here that one seaman cannot be a witness for another, if the witness and the party have a common interest in the point in contest. If the question be the loss of the ship, embezzlement equally affecting the whole crew, negligence, misfeasance, or malfeasance, to which all must contribute in damages, one of the crew cannot be admitted a witness for another. But where special circumstances distinguish cases,—where one, having made a similar contract with the other, the breach or performance whereof may happen without affecting the other,—where special indulgences are given to one, though not to the rest,—a seaman may be a witness for another. Where seamen are involved in similar breaches of contract, though the agreement of each is separate and independent, I hear them with caution. But this affects credit, not competency."

[3] Ibid.

against the ship, or *in personam* against the owner. If the vessel is not valuable enough to discharge the lien, or the owner is in bad circumstances, and the master solvent, he must pay the debt. It is his interest to throw the responsibility off himself; and this interest has been supposed, in the Courts of this country, to be sufficient, upon strict legal principles, to exclude him from testifying.[1]

351. This doctrine, however, has met with a good deal of criticism, and is encountered by the opinion of Lord Stowell, in the case of The Lady Ann.[2] The question arose in that case on the admission of a defensive allegation offered on the part of the owners of the vessel, in opposition to a demand of wages by a mariner. The objection taken was that the master was an incompetent witness, and, consequently, that the owners were not at liberty to plead the letters which they received from him, stating the arrival of the ship in the West Indies, and the desertion of the party who brought the suit. But this objection was overruled. "I am not aware," said Sir William Scott, "of any general objection to the competency of the master of a vessel as a witness in a suit for wages. The mariner has his election whether he will proceed against the owners, the master, or the ship; and in this case, the proceedings being instituted against the owners, the master

[1] The Phœnix, 1 Pet. Ad. R. 201; Malone v. Bell, Ibid. 139; Atkyns v. Burrows, Ibid. 244; Dunlap's Adm. Practice, 243, 244; Galloway v. Morris, 3 Yates, R. 445; The William Harris, Ware's R. 370, 371; The Hope, 2 Gallis. R. 48.

[2] Edwards' Ad. R. 236; see Conkling's U. S. Adm. 644.

has no immediate interest in the suit, and therefore is not an incompetent witness by any rule with which I am acquainted, though it may certainly be necessary to watch his testimony with jealousy, as his conduct may constitute a material part of the adverse case." The master is an incompetent witness to support any matters of defence set up which originate in his own acts, because for those acts he may be held personally responsible.[1]

352. When the advance wages of a seaman are charged in the shipping-paper, the suppletory oath of the master is required to make it proof. Unsupported by his oath, it is no further evidence than any book charge.[2] The master is not a competent witness to prove that a medicine-chest was on board, for the purpose of throwing the expense of medical advice on a seaman. For, if there were no legal exception to his competency, he would hardly be considered a proper witness to prove the sufficiency of the medicine-chest, or to satisfy a Court that it was accompanied with suitable directions for administering the medicine. But, by the Act of Congress of 1790,[3] the master is made personally liable for the expenses of medical advice; and therefore, if he were admitted as a witness, he would swear directly to his own discharge. He is, therefore, for that purpose, a clearly incompetent witness.[4]

353. A receipt, signed by a seaman, in full for

[1] The William Harris, Ware's R. 367; Robinett v. The Exeter, 2 Rob. Ad. R. 261. It should be observed that, in this latter case, the master was *two-thirds owner* of the vessel.

[2] The David Pratt, Ware's R. 495. [3] Ch. 29, s. 8.

[4] The William Harris, Ware's R. 367.

wages, is only *prima facie* evidence of payment. It is by no means conclusive. It is open to explanation by every kind of legal evidence. And it is of no greater effect, nor further conclusive on the rights of the parties, in consequence of having a seal annexed to it. A Court of Admiralty is, as to all matters falling within its jurisdiction, a Court of Equity, and is free from the artificial and technical rules of the common law in dealing with contracts between seamen and ship-owners.[1]

354. We close this chapter by observing, that when the hirer of a vessel has the possession transferred to him, and he appoints the master and crew, and sails her at his own expense, and has the entire control, he is considered as succeeding to all the rights and liabilities of the owners. He is substituted in their place, and is liable for the wages of the seamen.[2] In the case of Skolfield v. Potter,[3]

[1] Thorne v. White, 1 Peters' Adm. R. 178; Jackson v. White, Id. 179; Whiteman v. The Neptune, Id. 182; Thomas v. Lane, 2 Sumner's R. 11; The David Pratt, Ware's R. 495; Harden v. Gordon, 2 Mason's R. 561. In this latter case, Judge Story decided that when a receipt is given in full of all demands, it is not to be taken in the Admiralty as conclusive. It is open to explanation, and, upon satisfactory evidence, may be restrained in its operation. But the natural presumption is in its favor; and that presumption will prevail, until it is displaced by direct proof or strong circumstances.

In Whitney v. Eager, Crabbe's R. 422, it was held, that where the payment of a seaman's wages is refused unless he signs a receipt containing a release of all complaints against his officers, no attention whatever will be paid to such release.

[2] 3 Kent, 136; Reeve v. Davis, 1 Adol. & Ellis, 135; Skolfield v. Potter, Davies' R. 392.

[3] Davies' R. 392. See, also, to the same effect, The Sloop

Judge Ware held, that when a vessel is let to the master, to be employed by him, and he to pay to the owners a certain portion of her earnings, the owners will be liable to the seamen for their wages, though by agreement the master is to have the entire control of the vessel, to victual and man her, and furnish supplies at his own expense; unless, at the time of shipping, this contract is made known to them, and they are informed that they are to look to the master as the only owner.

355. This doctrine is ably vindicated by Judge Ware, and mainly upon the ground that the money paid over by the master, under his contract, is paid as freight; and the owners as receivers and having an interest in the freight, are liable to the seamen for their wages. "By the ancient maritime law," he observes, "the title of seamen to wages is made to depend on the issue of the adventure, for which they are engaged. Unlike other contracts of hiring, their right to compensation does not depend alone on the fidelity and skill with which they perform the services for which they engage; but with whatever perseverance and courage they exert themselves, their right to compensation is suspended on contingencies, which may affect the ultimate result of the

Fashion, American Law Jour., vol. iv., N. S. 279; Webb v. Pierce, 14 Law Rep. 200; Rich v. Coe, Cowper, 636; Story on Agency, s. 298; The Cassius, 2 Story's R. 93; The Nathaniel Hooper, 3 Sum. R. 577. But see *contra*, Taggard v. Loring, 16 Mass. R. 336; Emery v. Hersy, 4 Greenl. 407; Thompson v. Hamilton, 12 Pick. 425; Cutler v. Thurlo, 20 Maine, 213; Thompson v. Snow, 4 Greenl. 264; Cutler v. Winsor, 6 Pick. 335; Perry v. Osborne, 5 Id. 422; Manter v. Holmes, 10 Met. 402; Sproat v. Donnell, 26 Maine, 185.

voyage; it is made dependent on what has been termed the fortune of the vessel.

356. "What, then, is this fortune to which the seamen must look? The ship, says Emerigon, in the condition in which she was at the time of her departure from the port of outfit, together with all the freight which is gained in the course of the voyage, form that fortune of the vessel which constitutes the pledge to the seamen for their wages.[1] The privileged hypothecation, then, he adds, allowed to the mariners, comprehends every part of the ship, and every part of the freight, according to the nature of hypothecation, which is *tota in toto et—tota in qualibet parte*. Their privileged lien is entire over the whole, and is entire in every part. The ship and freight, with respect to wages, form one mass, and all that remains of either, at the end of the voyage, is pledged for their payment. The contract of the mariners, Emerigon goes on to say, is a species of copartnership. It is not, indeed, a copartnership as to all the effects of that contract, but as to some of its consequences; for the seamen have no claim to a remuneration, but to the extent of the effects embarked in the enterprise which they bring home. If all is lost, the mariners lose their wages, and they cannot then enforce the payment by a personal action against the master or owners. But if all is not lost, whatever remains of the ship or freight is specifically pledged for their payment. Freight earned, and put ashore, is saved from the effect of a supervening shipwreck, by which all that remains is lost. It is a partnership fund that has entered the common

[1] Trait des Assurances, ch. 17, sec. 11.

chest, and is hypothecated to the seamen for their wages.

357. "It appears by the testimony of the master, who was examined as a witness in the case for the respondents, that he has paid over to them, at different times, $600, and that on a cargo of lumber carried for them, the freight was $500, which has not been paid to him, but remains as part of the earnings of the vessel in their hands. In addition to this, the freight, on the cargo brought home in the vessel on her return to Bath, was received and collected by one of the owners, and is now in their hands.

358. "Now every dollar of this money was hypothecated to the seamen, as soon as it was earned, for their wages. To the amount due to them, it was their own hard earnings, and whoever received it *as freight*, received it subject to their claims. As the freight, says Emerigon, is the fruit of the vessel, it is just that it should first be appropriated to pay the wages of those whose labor has produced it. This destination of freight is derived from the nature of things, while their privilege against the vessel is against common right.[1] . . . . . .

359. "But it seems to me that the decision may more properly be put on a broader ground. Where the owners put their vessel into the hands of a master, to be employed by him on shares, I am prepared to hold as a just deduction from the principles and general policy of the maritime law, that they will

[1] Assurances, ch. 17, s. 11, No. 3.

continue liable to the seamen for their wages, notwithstanding the entire control of the vessel may be surrendered to the master, unless the seamen, at the time of their engagement, are notified that the master is to be considered as the sole owner, and that they are not to be liable. The rights of the seamen ought not to be affected by this private agreement between the master and owners.

360. "Even if the doctrine of the modern decisions is admitted, and the owners are held not liable to merchants who furnish supplies, there are strong objections to extending the principle to the contracts of seamen. They enter into their engagements in the confidence that they have the usual and legal securities for their wages. One of these, to which a seaman habitually looks, is the personal liability of the owners. But in this case, there will be in fact no owner, and the only personal security they have is that of the master. Another reason is, the freight, which is paid to the master, is the proper fund for the payment of the wages. In the hands of the master, the whole of it is liable for them. But here the freight is, from time to time, paid over for the hire of the vessel, and only one-half of it remains in his hands, at the close of their service, to respond for their claims. This private agreement between the owners and master, operates as a perfect surprise upon them. My opinion is, that they ought to be held as owners."

361. This elaborate opinion of Judge Ware would seem to run counter to the current of American authority in analogous cases. There may be sufficient

grounds to distinguish the case of supplies from the case of wages, but aside from equitable considerations, the same principle is equally applicable to both cases. They stand upon a common basis. Judge Curtis, however, in the recent case of Webb v. Pierce,[1] thus qualified the application of the general doctrine established by that decision. "To prevent misapprehension, I desire to state that I have examined the able opinion of Judge Ware in Skolfield v. Potter, in which he charged the general owners of a vessel let on shares with the wages of a seaman. There are elements in that case on which the decision may rest consistently with the principles upon which this case has been decided, and I do not intend to express any opinion as to a claim for wages on a general owner who has received freight earned in the voyage, for which wages are claimed."

362. In the recent case of The Sloop Fashion,[2] it was held by Judge Betts, that a sloop and craft navigating the waters of a State, or its vicinity, and taken by the master on condition that he victual and man her, and divide the earnings of the vessel with the owner, if such arrangement is known to the hands or seamen, the vessel is exempt from liability to the seamen for their wages on such hiring.

[1] 15 Law Rep. 9. In this case it was held, that when a master hires a vessel "on shares," under an agreement to victual and man her, and employ her in such voyages as he thinks best, having thereby the entire possession, command, and navigation of the vessel, and the relation of principal and agent not existing between the master and owners, the master thereby becomes the owner *pro hac vice*, during such time as the contract exists, and he, and not the general owner, is responsible for necessary supplies.

[2] 4 American Law Journal, N. S. 279, 280.

# PART II.

## CHAPTER I.

### OF PART-OWNERS.

363. Property in a ship may be acquired by two or more persons, either by building it at their own expense, or by the purchase of a part thereof of the sole owner, or by a joint purchase of the whole of another person. But, whether acquired by the joint building, or by a part purchase, or by a joint purchase, the parties, in the absence of all positive stipulations to the contrary, become entitled thereto, as tenants in common, and not as joint-tenants. In this respect, it will make no difference whether the title is acquired at one and the same time, by and under one and the same instrument, or whether it is acquired at different times, and under different instruments. This is the natural, if not the necessary result of the doctrine, that the *jus accrescendi* has no existence among merchants, or in the business of commerce and navigation. A different doctrine, which should introduce into the maritime law the narrow doctrine of the common law, as to joint-tenancy and the right of survivorship, would be fatal to the interests of commerce, and overthrow the plain dictates of public policy. The whole course of commercial usage and opinion has settled the doctrine the other way; and, accordingly, upon the

death of one of the part-owners, his executors and administrators become tenants in common of the ship with the survivors. Of course, the general rule of law, as to the rights of tenants in common, prevails in regard to ships, that each part-owner can sell only his own share thereof; whereas, in cases of partnership (although not in cases of joint-tenancy), any one partner can sell the entirety of the ship.[1]

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[1] Story on Partnership, 584. See also Campbell v. Steele, 1 Jones, 394; Knox v. Campbell, 1 Barr, 366; Hopkins v. Forsyth, 2 Harris, 34; Patterson v. Chalmers, 7 B. Monroe, 595; Helm v. Smith, 20 Com. Law Cond. R. 300; Hewitt v. Sturdevant, 4 B. Mon. 459; Hinton v. Law, 10 Missouri R. 701. It was held in this case, that one part-owner of a boat cannot sue the others at law for services rendered by him as clerk, under employment by the captain, also a part-owner. Moody v. Buck, 1 Sandf. S. C. R. 304; Macy v. De Wolf, 3 Wood. & M. 193. "To hold part-owners to be partners," said Judge Woodbury, in this case, "without an express contract to that effect, would not only violate the legal principles which govern other tenancies in common, but enable one part-owner,—though of only one-hundredth part,—to sell the whole ship or whole property owned in common, which is neither in conformity to usage or the fitness of things in such adventures." But see Shirley v. Steamer Bride, 5 Louis. R. 260, where it was held, that owners of steamboats are commercial partners. This decision was based upon Article 2796 of the Civil Code.

The doctrine laid down by Judge Story, however, which I have incorporated in the text, and in the very language which he employs, is abundantly supported upon every point by the numerous authorities which he cites, and is without doubt the rule of American law. An opinion, however, has been expressed, and by a very learned and eminent author (we refer to Abbott on Shipping, p. 1, ch. 3, § 1), that when a ship is not conveyed in several and distinct shares, but the entire ship is granted to a number of persons generally, that, in such a case, they become joint-tenants at law, and that the rule, *jus accrescendi inter mercatores locum non habet*,

364. While, however, the general relation between part-owners is that of tenants in common, it must not be understood that it is invariably and indispensably so. On the contrary, a ship may be the subject of partnership as well as anything else. But when this occurs, it constitutes an exception to the general rule, and must be specially shown. When a person is to be considered as part-owner, and when as a partner, in a ship, depends on circumstances.[1]

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which is applicable to a ship, is to be enforced only in a Court of Equity. The point is a novel one, and there has not been, so far as I know, any direct adjudication upon it. It is not, however, unusual to omit any specification of the shares of each part-owner, both in the register and bill of sale; and it never has been held, that such an omission made the parties joint-tenants with benefit of survivorship. See Merrill v. Bartlett, 6 Pick. 46; Thorndike v. De Wolf, 6 Ibid. 120; Glover v. Austin, Ibid. 209, 221, 222; Ohl v. Eagle Ins. Co., 4 Mason, 172, 390; Gould v. Gould, 6 Wend. 263; Hopkins v. Forsyth, 2 Harris, 34; Nicoll v. Mumford, 20 John. R. 611; Abbott on Ship., p. 124. See also 3 Kent, 154.

We may here observe, that while it is the settled principle, that the interest of part-owners is so far distinct that one of them cannot dispose of the share of the other, yet if the co-tenant subsequently ratifies the sale, it becomes in effect a ratified sale by all. If a co-tenant sells the common property as exclusively his own, such sale is a conversion, and the other tenant may maintain trover therefor against him; or he may, in case the purchaser also sells and delivers the property as his own, maintain trover against such purchaser for the subsequent conversion. The sale by one tenant is deemed a constructive destruction of the property held in common, but a mere dispossession of one tenant in common by his co-tenant, does not amount to such constructive destruction of the property, and does not afford a ground of action in trover. See Abbott on Shipping, p. 128, note.

[1] Harding v. Foxcroft, 6 Greenleaf's, R. 77; Macy v. De Wolf, 3 W. & M. 193; Phillips v. Purington, 15 Maine, 425; Seabrook

365. Ships were "originally invented for use, and profit, not for pleasure or delight; to plough the

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v. Rose, 2 Hill's (S. C.) Ch. R. 555; Lamb v. Durant, 12 Mass. 54; Nicoll v. Mumford, 20 John. 611; 1 East. 20, 8 B. & Cres. 12; 3 Kent's Com. 154; Doddington v. Hallett, 1 Vesey, 497. The doctrine declared by Lord Hardwicke in this case, so far as it affirms, that a ship may be the subject of a partnership, is the settled law of this country. But, Mr. Belt, in his "Supplement to the Reports of Vesey, Senior," pp. 205–209, gives the agreement between the parties, and observes: "It appears rather singular that Lord Hardwicke should have said so much as is reported on the subject of the contractors being partners, since the agreement between them on the inception of the undertaking negatives such a supposition as strongly as words could make it, and since this very argument is pressed by the defendant's counsel, towards the top of page 498." Lord Hardwicke might have stated the proposition in too broad terms, he might have erred in applying it to the circumstances before him, but the principle itself is clear, that the several owners of a ship may stand to each other in the relation of partners, the ship being the subject of the partnership. In the case of Exparte Young, 2 Ves. & Beames' R. 242, a petition was presented by part-owners of a ship, contending that, though tenants in common, they were to be considered as joint owners, and upon bankruptcy, the distribution was to be as of joint property, to be applied first to the joint debts, according to Doddington v. Hallett, especially as the bankrupts had been intrusted as the managing owners. Lord Eldon began as usual with doubting. He thought it would be a very strong act for him, by an order in bankruptcy, from which there was no appeal, to reverse a decree made by Lord Hardwicke in a cause. "From a manuscript note, I know it was his most solemn and deliberate opinion, after great consideration, that the contrary could not be maintained; and there is no decision in equity contradicting that." But after a liberal indulgence of his doubts, his lordship, at a subsequent day, said, that after great consideration, he must decide against the case of Doddington v. Hallett. The opinion of Lord Hardwicke was followed by the N. Y. Court of Appeals in Mumford v. Nicoll, 20 John. 611, and by Chancellor De Saussure in the case

sea, not to lie by the walls."[1] Hence, where part-owners have entered into no express agreement by which the employment of the vessel is to be controlled, the law in favor of commerce will interpose, and compel obstinate and dissenting part-owners, to yield the property, to be employed by the majority in value, "upon any probable design."

366. The jurisdiction of Courts of Admiralty in cases of part-owners, having unequal interests and shares, is not, and never has been applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called. The majority of the owners have a right to employ the ship in such voyages as they may please; giving a stipulation to the dissenting owners for the safe return of the ship; if the latter, upon a proper libel filed in the Admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all. If the minority happen to have possession of the ship, and refuse to employ it, the majority may, upon a warrant to arrest the ship, obtain possession of it, and send it to sea, upon giving the customary security for the safe return of the ship.[2]

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of Seabrook v. Rose, 2 Hill's (S. C.) Ch. R. 553; 1 Story, Eq. Juis., S. 499; Hoxier v. Carr, 1 Sum. 173; 4 Maule & Selwyn, 456.

[1] Molloy, B. 2, ch. 1.

[2] The Steamboat Orleans v. Phœbus, 11 Peters' R. 175; The Apollo, 1 Hagg. 306, 312; The Petrel, 3 Hagg. Adm. R. 299. Suits in the Admiralty touching property in ships, are of two kinds: one, called *petitory* suits, in which the mere title to the

367. When the part-owners are equally divided in opinion upon the question whether the ship shall be employed in any voyage or adventure whatsoever, the law, looking to the considerations of commercial policy already mentioned, gives effect, through the like Admiralty process, and upon the like condition, to the will of those who are in favor of her employ-

property is litigated and sought to be enforced, independently of any possession, which has previously accompanied or sanctioned that title; the other, called *possessory* suits, which seek to restore to the owner the possession of which he had been unjustly deprived, when that possession has followed a legal title, or as it is sometimes phrased, when there has been a possession under a claim of title with a constat of property. The distinction between *petitory* and *possessory* suits, admitted into the practice of the British Admiralty, and permitting it to exercise jurisdiction in cases under the latter denomination, but excluding it in cases under the former, is unknown in our Admiralty Courts. The Tilton, 5 Mason, 465. See also, The Aurora, 3 Rob. 133, 136; The Warrior, 2 Dod's R. 288; The Pitt, 1 Hagg. R. 240. It is proper to observe, that it was formerly held by the English Admiralty, and for a long period the right was exercised, to examine and to pronounce for the title of ships on questions of ownership. It was not until some time after the Restoration, that the Courts of common law interposed, and claimed that the jurisdiction belonged exclusively to them. Since that time, the Admiralty has not interfered with questions of this nature, except when the consideration of property arises incidentally, and in such a manner as is not disputed between the parties. The former jurisdiction, however, is now restored by the Act of 3 and 4 Victoria, chap. 65, which is entitled an "Act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England." Section 4 of the Act provides, "That the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said Court after the passing of this Act."

ment.[1] It must be understood, that in all these cases, where the ship is sent to sea, against the wishes of the dissentient part-owners, and upon application to a Court of Admiralty, they bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but she sails wholly at the charge and risk, and for the profit of the others.[2] And if she is lost on the voyage,

[1] Conkling's Adm. 252; Story on Partnership, § 435; 3 Kent's Com. 153, 156.

[2] The Peggy, 4 Rob. Ad. R. 304; The Apollo, 1 Hagg. Ad. R. 306, 312; Abbott on Shipping, 127. "The law of this country," says Mr. Abbott, "appears to possess an important advantage over all the ordinances that have been cited; because, while it authorizes the majority in value to employ the ship 'upon any probable design,' it takes care to secure the interest of the dissentient minority from being lost in the employment of which they disapprove. And for this purpose it has been the practice of the Court of Admiralty, from very remote times, to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares. When this is done, the dissentient part-owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but she sails wholly at the charge and risk, and for the profit of the others. This security may be taken upon a warrant obtained by the minority to arrest the ship. And it is incumbent on the minority to have recourse to such proceedings as the best means of protecting their interest; or, if they forbear to do so, at all events they should expressly notify their dissent to the others, and if possible to the merchants also, who freight the ship. For it has been decided that one part-owner cannot recover damages against another, by an action at law, upon a charge of fraudulently and deceitfully sending the ship to foreign parts, where she was lost. And it has also been decided in the Court of Chancery, that one part-owner cannot have redress in equity against another for the loss of a ship sent to sea without his assent. These decisions

the estimated value of the shares of the dissentient part-owners, must be paid in full. The sums stipulated in the bond given for their security, are the measure of the loss they have sustained. If, however, it should be made to appear, that the dissentient part-owner, actually and efficiently contributed to the loss of the vessel, a Court of Admiralty will deem a forfeiture of the whole or a part of the estimated sum, according to the nature and circumstances of the transaction.[1]

368. If a vessel be sent on a voyage by the major interest, and the minority neither apply to a Court of Admiralty for security, nor take any part in the voyage, they must bear their proportion of the expenses, and are entitled also to their proportion of the profits. The repairs of the vessel are repairs made for them; the supplies are supplies for them; and the proceeds are proceeds to be divided among them; for if it be true, that he who is entitled to the profits, must bear the burden; it is equally just that he who bears the burden should be entitled to the profits.[2]

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are consonant to the general rule of law, that when one tenant in common does not destroy the common property, but only takes it out of the possession of another, and carries it away, no action lies against him; but if he destroys the common property, he is liable to be sued by his companion." See also, as to the jurisdiction of the Admiralty in these cases, Willings v. Blight, 2 Peters' Adm. R. 288; 2 Brown. Cir. and Adm. Law, 131; Davies v. Johnston, 4 Sims. 539; 2 B. & C. 248; 2 Meriv. 77.

[1] The Apollo, 1 Hagg. Adm. R. 106; Jouanneau v. Shannon, 4 Louis. R. 330.

[2] Gould v. Stanton, 16 Conn. R. 12; Card v. Hope, 2 B. & C. 661. In the whaling business, the owners of the vessel, as a

369. When one part-owner of a vessel, known to be so by the other owners, did not, when he became a part-owner, comply with the Acts of Congress, but not for any purpose of fraud or concealment, and another part-owner obtained an enrolment of the vessel, swearing that he and some others were sole owners, without mentioning the name of the first part-owner, such omitted part-owner is entitled nevertheless to ask for security from the other owners, for the safety of the vessel on a voyage not approved by him.[1]

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general thing, appoint some person, usually one of their number, to be manager of the concern. This person orders the necessary repairs, furnishes the supplies, procures the seamen, in short, as ship's husband, does all that is necessary for the voyage, charging each shareholder his proportional part; and upon the return, after paying expenses, and deducting the usual commissions for his own services and allowances, and paying the officers and crew such proportions as they stipulated for, divides the balance, being the net proceeds, among the joint owners of the vessel, in proportion to the number of shares by them respectively owned. These agents, thus acting for the whole, become responsible to those who may happen to be owners. In this way, that delay and those conflicts of opinion are avoided, which would arise from the meetings and consultation of such a number of persons as frequently have an interest in these voyages. This agent having been appointed by a majority of the shareholders, is supposed to speak and act the sentiments of the majority; and in ordinary circumstances, that will most prevail. Gould v. Stanton, *supra*. See Macy v. De Wolf, 3 W. & M. 193.

[1] The Lodemia, Crabbe's R. 271. The dissentient part-owner in this case owned one-eighth of the vessel, and he was secured in double the value of his share.

It is provided by the 5th section of the Act of July 29, 1850, That the owner or agent of the owner of any vessel of the United States, applying to a collector of the customs for a register or enrolment of a vessel, shall, in addition to the oath now prescribed

370. As the law, upon considerations of national policy, enables a majority of the part-owners to employ the ship even against the will of the minority, so, as an incident of that power of employment vested in the majority, they have a right to appoint the officers and crew of the ship, and to displace them at their pleasure. But such a right carries with it a duty,—the duty of exercising a free and impartial judgment in the choice of every person who is to be intrusted with the management of the outfit, and with the navigation of the ship, *ut dentur digniori*. Any contract, therefore, which is calculated to fetter the judgment, and bind some of the part-owners to concur in the nomination of particular persons, at the peril of an action, is a violation of that duty. The violation of duty becomes greater and more odious if the contract be founded on motives of peculiar gain and advantage to the contractor; for all the part-owners ought to share rateably in every profit that may be made of the ship. And if such contracts were allowed by the law, they would directly operate to discourage all persons from becoming part-owners of ships. The duty, however, is owing not only to the charterers and other part-owners of a ship, but also to all whose life or property may be embarked in her. And, hence, a violation of the duty is contrary not only to the interest of the charterers and part-owners, but also to

by law, set forth in the oath of ownership, the part or proportion of such vessel belonging to each owner, and the same shall be inserted in the register of enrolment; and that all bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing.

another most important object, namely, the protection and safety of the lives and property embarked on the sea. All such contracts are utterly void. An agreement, therefore, by two part-owners, who were the ship's husbands, with a third person, to sell him a part of their shares, and he to be appointed master (they holding the majority of interests), and they to be continued as the ship's husbands, and he or they to have the appointment of his successor, as master, has been held to be utterly void.[1]

371. A Court of Admiralty will entertain a suit to dispossess the master, although he may be a part-owner. The dispossession of a master is not in its nature an uncommon proceeding: all that is required in cases where the master is not an owner, is that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master and part-owner, something more is required before a Court of Admiralty will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession, therefore, the common law is upon general principles inclined to maintain. It will require some special reason before it will interpose; such, for instance, as that the master is irregular in his accounts with his owners.[2] Mr. Justice Story lays it down as a rule of the common as well as the French law, that the majority of

[1] Card v. Hope, 2 Barn. & Cr. 661, 674, 675; Story on Partnership, 606, 607.

[2] The Sisters, 3 Rob. Ad. R. 213; The New Draper, 4 Rob. 287; Edwards' Ad. R. 242.

owners may displace the master at their pleasure, even although he may be a part-owner.[1]

372. He cites no authority for the position that the common law confers this power upon the major part of the owners; and it may well be doubted if they have such power. If the Courts administering the maritime law of the country refuse to displace a master, who is also a part-owner, upon the mere application of the majority of owners, who have no ground for their application but their will, inclination, or pleasure, then we apprehend that they cannot, of their own mere motion, do that which the maritime law will not permit to be done when its aid is directly invoked for that purpose. It is true, the two systems of law may differ upon this subject; but we are aware of no decision of any Court of common law, or even the *dictum* of any Judge, that authorizes us to suppose that any such difference does in fact exist.

373. We have already seen that where a majority

[1] Story on Partnership, 606; Boulay Paty, Droit Comm., tome i., tit. 3, p. 340. Where a party, late master, and claiming to be part-owner, of a vessel, prayed for possession, and also for security for her safe return from a voyage projected by the other owner, and the question of title depended on the state of the accounts between the parties, which could not conveniently be settled before the Court: an interlocutory order was made, that the vessel be delivered to the libellant, to proceed on the projected voyage, on his own stipulation for her return and submission to the order of the Court, and on payment of the costs accrued at the date of the order, but the ultimate liability for those costs to await a final decree. The North America, Crabbe, 420.

of the part-owners decline to employ the ship at all, the minority, upon application to the Admiralty, will be permitted to send her on a voyage, upon the usual conditions and stipulations.[1] And it has been contended, by eminent jurists, that they had the same right to employ her when the majority of the part-owners declined, not to employ her at all, but declined to employ her at the particular time and upon the particular adventure. "Many of the foreign jurists contend," says Kent, "that even the opinion of the minority ought to prevail, if it be in favor of employing the ship on some foreign voyage. Emerigon, Ricard, Straccha, Ruricke, and Cleirac, are of that opinion. But Valin has given a very elaborate consideration to the subject, and he opposes it, on grounds that are solid; and he is sustained by the provisions of the old ordinance, and of the new code. Boulay Paty follows the opinion of Valin, and of the codes, and says that the contrary doctrine would enable the minority to control the majority, contrary to the law of every association, and the plainest principles of justice."[2] And this seems to be the prevailing opinion among learned jurists and writers of our own time.[3]

374. But a mere wanton or obstinate refusal of the major part of the owners to employ the ship—a

[1] Ante, p. 360.

[2] 3 Kent's Com. 156; Ord. de la Marine, liv. ii., tit. 8, art. 5; Valin's Com., tome i., 573–584; Code de Commerce, art. 220; Cours de Droit Com. Mar., tome i., 339–347.

[3] See Story on Partnership, 608; 3 Kent, 156; Abbott on Ship., pp. 70–76.

case not likely to occur often—the law will not countenance or permit. It is a principle discernible in all maritime codes, that every encouragement and assistance should be afforded to those who are ready to give to their ships constant employment; and this, not only for the particular profit of owners, but for the general interests and prosperity of commerce.[1]

375. When the part-owners have equal interests, and are equally divided as to the employment of the ship upon any particular voyage or adventure, we have various and conflicting opinions as to what is to be done in such a posture of affairs. "In the predicament here mentioned," says Mr. Justice Story, "several cases may arise: 1. When the part-owners are equally divided as to the employment of the ship upon any voyage or adventure whatever, one being in favor and the other against any such employment, upon the ground that, at the time, it will be either unprofitable, or very hazardous, under all the circum-

[1] Willings v. Blight, 2 Peters' Adm. R. 292. "If agriculture be, according to the happy allusion of the great Sully, 'one of the breasts from which the state must draw its nourishment,' commerce is certainly the other. The earth, the parent of both, is the immediate foundation and support of the one, and ships are the moving powers, instruments, and facilities, of the other. Both must be rendered productive by industry and ingenuity. The interests and comforts of the community will droop, and finally perish, if either be permitted to remain entirely at rest. The former will less ruinously bear neglect, and throw up spontaneous products; but the latter requires unremitted employment, attention, and enterprise, to insure utility and profit. A privation of freight, the fruit and crop of shipping, seems, therefore, to be an appropriate mulct on indolent, perverse, or negligent part-owners." Peters, J., in Willings v. Blight, *supra*.

stances; 2. Where each part-owner is equally willing to have the ship employed in some voyage or adventure, but they differ as to the voyage; or, 3. Where each part-owner is ready to take the whole ship for a voyage to be planned by himself; but he will not engage with the other in any voyage whatsoever."[1]

375 a. In the first case, it is the opinion of learned writers, and supported by the practice of the English Admiralty, that the part-owner who is willing to employ the ship for a voyage, or adventure, is entitled to have it delivered to him for that purpose, upon giving the usual security.[2]

376. In the last two cases, the part-owners present equal claims to the Court, and there is no sufficient grounds for preferring either. Under such circumstances, therefore, the general maritime law, with, equal wisdom and justice, authorizes a sale of the ship, and divides the proceeds among the owners according to their respective shares. Judge Hopkinson, however, in the case of The Seneca,[3] in a very ingenious and imposing opinion, refused to decree a sale, on the application of a part-owner, placed in the predicament here mentioned.

377. But, on appeal, and after a very able and elaborate argument, Judge Washington reversed the

[1] Story on Partnership, p. 609.

[2] Molloy, b. ii., ch. 1, s. 2, p. 308; 1 Montague on Partn. b. ii., ch. 1; Abbott on Shipp., p. 75; Story on Partnership, 609, 610, and authorities cited.

[3] 1 Gilpin's R. 10.

sentence of the District Court, and decreed a sale of the vessel. He said the law applicable to the case was not found in the practice or adjudications of the Admiralty Court of England,[1] nor in those great sources of maritime jurisprudence, the Rhodian law, and the laws of Oleron and Wisbury. "Our attention is, then, invited to the civil law, or, rather, to the Roman marine code,—another legitimate source of general maritime law, in which we find sundry wise provisions for adjusting disputes between part-owners of vessels, from which the three following rules may be deduced:—1. That the opinion and decision of the majority in interest of the owners, concerning the employment of the vessel, is to govern; and therefore they may, on any probable design, freight out or send the ship to sea, though against the will of the minority; 2. But if the majority refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority, or to the public detriment; and since, in such a case, the minority can neither employ her themselves, nor force the majority to do so, the vessel may be valued and sold; 3. If the interests of the owners be equal, and they differ about the employment of the vessel, one-half being in favor of employing her, and the other opposed to it, in that case the willing owner may send her out."

378. Having traced the maritime law thus far, and shown that neither of the foregoing rules applied to

[1] See Ouston v. Hebden, 1 Wils. 101; The Apollo, 1 Hagg. Ad. R. 306.

the case before him, in which there were no unequal interests, and no unwilling owner, but each party desirous, and equally desirous, to employ their ship, Judge Washington turned his attention to the French Ordonnance de la Marine, and decided the cause upon the authority of the 5th and 6th articles of that code.[1] There has been no other reported decision upon this point; but the opinion of Judge Washing-

[1] See this case in 18 American Jurist, 486. The following is the 6th article of the code: "No person may constrain his partner to proceed to the public sale of a ship held in common, except the opinions of the owners be equally divided about the undertaking of some voyage." Valin's exposition of this article is very satisfactory. In his first volume, p. 585, he says: "The case excepted in this article is, 'when the opinions of the parties are equally divided in the undertaking of some voyage,' upon which we may remark that the question is not of two equal opinions, of which one is to leave the vessel without any kind of voyage, and the other to undertake such or such a voyage, there being no doubt in that case that the opinion favorable to a voyage ought to prevail, saving the right to discuss the projected voyage, but solely of the case of two opinions, equally divided upon the particular enterprise projected by one moiety of the persons interested, and rejected by the other moiety, whether that moiety proposes on its part another voyage, or confines itself to a disapproval of it, provided, nevertheless, that it gives plausible reasons for its conduct; otherwise, this would have the air of an absolute refusal to permit the vessel to be navigated, which justice could not tolerate, being contrary to the object of the vessel, to the original intention of the parties, and to the interests of commerce."

The jurisdiction of the Admiralty to decree a sale of the vessel, where there is a dispute between the part-owners, and fraudulent conduct is charged against one of them, was asserted by Judge Bee, in the case of Skrine v. Sloop Hope, Bee's Adm. R. 2. See also the authorities cited upon this subject in Story on Partnership, p. 615, 618; 3 Kent's Com., p. 154, note (*a*); Conkling's Adm. 254–257.

ton has the support of the most eminent authority, and expresses, I apprehend, the rule of American law.[1]

379. The repairs of a ship, and necessaries for the employment of it, ordered by one part-owner, are a charge upon all the owners, and, when ordered in a foreign port, constitute a lien upon the ship. When the order is given by the master, the creditor has his liability, as well as that of the owners, the master being considered their agent.[2] If, however, the repairs are made or the necessaries furnished upon the exclusive credit of the master, or the ship's husband, or of any other person,—one of the part-owners, even,—in that case the ship-owners are not liable. The law gives a remedy to the person making repairs, or furnishing supplies,—an ample remedy, a threefold remedy; but, if he chooses to waive it, and enters into an express contract, upon the exclusive credit of another, without any intention of resorting to the owners, he is at liberty to do so. And he cannot afterwards, when he finds that the security which he deliberately chose is worthless, resort to the original security, which he deliberately abandoned.[3]

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[1] Vide Benedict's Admiralty, p. 40, as to jurisdiction of Admiralty Courts to decree a sale of a ship.

[2] Muldon v. Whitlock, 1 Cowen, R. 290; Carlisle v. Steamer Eudora, 5 Louis. R. 15; Chapman v. Durant, 10 Mass. R. 47; Scottin v. Stanley, 1 Dall. R. 129; Schermerhorn v. Soines, 7 John. R. 311.

[3] Hursey v. Allen, 6 Mass. R. 163; James v. Bixby, 11 Mass. R. 34; Cox v. Reid, 1 Payne & Carr. R. 602; Reid v. White, 5 Esp. R. 122; *Ex parte* Bland, 2 Rose, 91; Stewart v. Hall, 2 Dow. P. R. 29.

380. What circumstances will amount to giving exclusive credit, so as to discharge the owners, does not admit of being determined by any rule of universal application. Generally, however, if the party who gives the credit knows that there are other part-owners, but charges the repairs or supplies to the part-owner who orders them, he is presumed to give an exclusive credit to him. But merely receiving payment from one part-owner for his share, or charging the master, or ship's husband, or other agent, with the debt, will not of itself amount to giving an exclusive credit to them which will discharge the owners. Ordinarily, all the part-owners should be joined in a suit by the common creditor; but where the credit is given, and the creditor does not know at the time that there are other part-owners, he may sue him alone from whom he receives the order.[1] In this latter instance, not knowing that there were other part-owners when he gave the credit, he may join them all in the suit, for they are all liable. No exclusive credit was intended to be given; for it cannot be inferred, from any act or knowledge of the party, that he elected to give exclusive credit.[2]

381. By the civil law, the bare circumstance of persons being joint owners of a boat, does not make them responsible *in solido;* but if they are associated

[1] Story on Partnership, s. 455; Abbott on Shipp., 134. See also Leonard v. Harrington, 15 John. R. 298; Marquand v. Webb, 16 Ibid. 89; Thompson v. Finder, 4 C. & P. 158.

[2] Story on Partnership, s. 455; Thomson v. Davenport, 9 B. & C. 78.

together for the purpose of carrying goods and passengers for freight or hire, they are responsible jointly and severally. And this, notwithstanding the losses happened by the fault of the master of the boat, and notwithstanding some or all of the owners were absent, and unable to prevent such loss.[1] By the common law, part-owners are liable *in solido* for all the debts contracted upon account of the ship, or other common property. That law does not, like the civil, restrict the liability of each part-owner to the payment of his own share or proportion of the common expenditure, when there is no express agreement to be bound *in solido*. It regards them as standing to each other as *quasi* partners, accountable for the excess which one should have advanced or paid beyond the other; or as tenants in common of a chattel, entitled to a remedy for any money expended on the common property beyond the due proportion.[2]

382. When repairs and supplies are ordered by one part-owner, and he gives to the creditor therefor, his negotiable promissory note, the other part-owners are not thereby discharged, unless it was intended as an absolute payment of the debt. Because by the common law, which is the law in this particular of all the States of the Union, except Massachusetts and Maine, a note taken in payment of a debt is ordinarily but a conditional payment thereof; that is,

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[1] David v. Eloi, 4 Lou. R. 106; Burke v. Clarke, 11 Lou. R. 206, and authorities therein cited from the civil law.

[2] Gardner v. Cleveland, 9 Pick. R. 334; Story on Partnership, § 456.

it is an absolute payment only when duly paid. The presumption, *prima facie*, of the common law is, that a note taken for a debt is a conditional payment only; but this presumption may be rebutted by proof, that it was taken as an absolute payment. On the contrary, in Massachusetts and Maine, the presumption is, *prima facie*, that a note taken for a debt is an absolute payment, but this presumption may be rebutted by proof, that it was intended as a conditional payment only.[1]

383. If, however, the creditor should take a note from the ship's husband, or other agent of the part-owners, and give a receipt therefor, as if the note were a discharge of the debt, and this enables the agent to settle with his principals, and receive from them a sum of money or other advantage, which otherwise he would not have been able to obtain, and the principals do in fact settle with the agent, they cannot be afterwards held responsible upon the contract of their agent, if he fails to pay. Because the creditor has so dealt with the agent as to give all parties to understand that the agent has discharged the debt.[2]

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[1] The Barque Chusan, 2 Story's R. 455; Peter v. Beverly, 10 Peters' 567; Abbott on Shipp., p. 135, and note; Arnold v. Camp., 12 John. 411; Muldon v. Whitlock, 1 Cowen R. 290; Higgins v. Packard, 2 Hall (N. Y.) 547.

[2] Wyatt v. The Marquis of Hertford, 3 East's R. 147; Cheever v. Smith, 15 John. 276; Muldon v. Whitlock, 1 Cowen R. 290. "If a creditor of the principal," says Judge Story (Com. on Agency, § 433), "settles with the agent, and takes a note or other security from the latter for the amount, due by the principal, although, as between the parties, it is intended only as conditional

384. The ship's husband, whom it is usual for the several part-owners to appoint, is their agent or commissioner. He may be a part-owner, or a stranger. His powers are by mandate or written commission by the owners, or by verbal appointment; the latter chiefly when he is also part-owner. His duties are, 1. To arrange everything for the outfit and repair of the ship—stores, repairs, furnishings; to enter into contracts of affreightment; to superintend the papers of the ship. 2. His powers do not extend to the borrowing of money; but he may grant bills for furnishings, stores, repairs, and the necessary arrangements, which will bind the owners, although he may have received money wherewith to pay them. 3. He may receive freight; but is not

payment; yet, if the creditor gives a receipt, as if the money were received, or the security were an absolute payment, so that the agent is thereby enabled to settle, and does settle, with the principal, as if the debt had been actually discharged, and the principal would otherwise be prejudiced, the debt will be deemed, as to the latter, absolutely discharged. Upon this ground, when work was done for the principal, and the amount was presented to his steward, who gave his own check on a banker for the amount; and thereupon the creditor gave a receipt for the money on account of the principal; and upon the dishonor of the check, the agent accepted a draft for the amount, payable on time; it was held, that if the principal had in the mean time settled his accounts with his steward, or had dealt with him differently in consequence of that receipt, so that he would be prejudiced thereby, the principal would be discharged. The same doctrine would apply to the case of a ship's husband, or a shipmaster, contracting a debt for supplies, or for repairs of the ship, where an exclusive credit is originally given to him, or an absolute payment is afterwards acknowledged, by a receipt upon a note or other security being given by such agent for the amount, whereby he is enabled to settle with, and to receive the amount in credit or otherwise, from the owners."

entitled to take bills instead of it, giving up the lien by which it is secured. 4. He has no power to insure for the owner's interest without special authority. 5. He cannot give authority to a law agent that will bind his owners for expenses of a lawsuit. 6. He cannot delegate his authority. Such is the summary which Mr. Bell, in his work entitled, Principles of the Law of Scotland,[1] has given of the powers and duties of a ship's husband.

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[1] Page 449. "It is usual," says Mr. Abbott (Abbott on Shipp., 136), "for the several part-owners to appoint a person, frequently one of their own number, to be the manager of their joint concern, their general agent in the use and employment of the vessel, under the name of ship's husband. His duties and powers as such are often defined and limited by the terms of a special agreement for that purpose between him and his employers, or co-owners. When no such agreement has been made, he is to exercise an impartial judgment in the employment of tradesmen and the appointment of officers; and be careful that his choice in the situation of a master be not biassed by any private pecuniary transaction. He is to see that the ship is properly repaired, equipped, and manned —to procure freights or charter-parties—to preserve the ship's papers—to make the necessary entries—adjust freight and averages —disburse and receive moneys, and keep and make up the accounts as between all parties interested. His acts for these purposes are considered to be the acts of all the part-owners, who are liable on all contracts entered into by him for the conduct of their common concern—the employment of the ship. Yet, when a tradesman brought an action for cordage against the owners of a ship, and it was proved that he had taken a bill of the managing owner for the amount, which was dishonored, and renewed, and dishonored again, Lord Ellenborough said, 'If the plaintiff, dealing with the managing owner, has adopted him, he has discharged the others. If he has adjusted accounts with him on that footing, the other defendants are entitled to the benefit of it.'" See also, 1 Bell's Com., p. 411; Story's Com. on Agency, § 36; Turner v. Burrows, 8 Wend. R. 144, 151.

385. The ship's husband, although appointed by the owners, and constituted their agent, with respect to the repairs, equipment, management, and other concerns of the ship, has no authority as such to borrow money on their account, or to insure the ship, or to pledge the shares of the several owners for the expenses of a lawsuit. Nor is the power of a part-owner in these particulars, without an express or implied delegation of authority from the other owners, more extensive than the power of a ship's husband.[1] Hence, neither a ship's husband, nor part-owners, who insure the interest of their co-owners in a vessel without express authority, can recover the premium paid by them.[2] It would be otherwise, if the several owners should afterwards sanction the insurance, in which case the underwriters would be bound, notwithstanding the insurance was originally effected without authority.[3]

386. The admission of a partner, with reference to a subject of copartnership, is binding upon the firm; but this principle is not applicable to the case of an admission of a part-owner, with reference to a subject of copart-ownership. Such admission is not binding on his copartner.[4] Neither the managing owner,

[1] Bell v. Humphries, 2 Starkie, 345; French v. Backhouse, 5 Burr. 2727; Campbell v. Stein, 6 Dow. 135; Hooper v. Surky, 4 Campb. R. 67.

[2] Turner v. Burrows, 8 Wend. R. 144. See also, French v. Backhouse, *supra;* Bell v. Humphries, 2 Starkie's R. 345; Lawrence v. Sebor, 2 Caines' R. 203.

[3] Lucena v. Crawford, 1 Taunt. 325; Roath v. Thompson, 13 East, 274; Hagedorn v. Oliverson, 2 M. & Sel. R. 485; Turner v. Burrows, *supra.*

[4] Jaggers v. Brunnings, 1 Stark. 14.

nor ship's husband has any power to purchase a cargo on the credit of the owner. To bind them, upon any contract, made by such agent, beyond the outfit, care, and employment of the vessel, it must be shown that the agent has a superadded authority to make such contract.[1]

387. It is the prevailing doctrine, indeed there is no adverse decision upon this point, that the ship's husband, whether he be a part-owner or stranger, has no lien upon the ship for his disbursements and outfits. We are unable to perceive any solid reason or substantial grounds of policy, for the rule that deprives him of this security. He stands upon the same footing with the master in this particular, and we have endeavored to show elsewhere, that by the general maritime law, and upon a principle of common justice, the latter is entitled to the security of the ship for his disbursements on account of the ship. It is, therefore, unnecessary to repeat what we have already said. We may remark, however, that if the one is entitled to a lien upon the ship, the other is equally entitled, and upon the same grounds. If this lien is denied to one, consistency demands that it should be denied to the other.

388. The law, however, gives the ship's husband, if he is a part-owner, a lien for his disbursements and outfits upon the proceeds and profits of the voyage or adventure undertaken upon joint account and joint profit, as a sort of partnership for the voyage or adventure. If he be a mere stranger, and has, in

[1] Hewitt v. Buck, 17 Maine, 147.

the course of his employment as such, come to the possession of the proceeds of the voyage, or of the ship itself, if sold, or of the ship's documents and freight, he will be entitled to a lien thereon for his reimbursement and indemnity. This, however, as the law now stands, is the bound and limit of his lien.[1]

389. But whether a part-owner, in his character as such, has any lien upon the shares of his co-owners for expenditures, advances, and debts, incurred on account of the ship, as for repairs, or for outfits for a voyage, or by discharging existing liens on the ship, is a question of a different nature from the one we have been considering,—a question, too, upon which great jurists have differed, both in England and this country, and with respect to which the weight of judicial authority is so nearly divided between the opposing scales, that neither can be said to preponderate. In England, the opinion of Lord Hardwicke is opposed to the opinion of Lord Eldon, the latter, however, ruling the law in that country.[2] In America, the doctrine held by Lord Eldon has the support of Chancellor Kent and Judge Hopkinson.

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[1] Story on Partnership, § 433; 1 Bell's Com., pp. 503–505; *Ex parte* Young, 2 Ves. & Beam. 242; Mumford v. Nicoll, 20 John. R. 611.

[2] Doddington v. Hallett, 1 Ves. 497; Overruled by *Ex parte* Young, 2 Ves. & Beam. 242.

[3] Mumford v. Nicoll, 4 John. Ch. R. 522; Patton v. The Randolph, 1 Gilpin, 457, 460. Chancellor Kent, in Nicoll v. Mumford, *supra*, referring to Doddington v. Hallett, *supra*, said, "I dare not follow a case which has never had effect, and has been so authoritatively exploded." (See *Ex parte* Young, 2 Ves. & Beam.

But it was deliberately overthrown by the New York Court of Appeals,[1] and the opposite doctrine was followed by Chancellor De Saussure, in the case of Seabrook v. Rose,[2] who considered the decisions of the American Courts, in analogous cases, as entirely subversive of the equity doctrine prevalent in England.

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242; *Ex parte* Harrison, 2 Rose's Cases in Bankruptcy, 76; *Ex parte* Gibson, 1 Montagu on Partnership, 102, note; and *Ex parte* Parry, 5 Vesey, 575.) "The late cases which have been referred to, are in point against the allowance of any partnership claim, or taking an account on the foot of any partnership in the vessel." In Patton v. The Randolph, it was suggested by the counsel of the libellants, that a joint owner has a lien on the share of his co-owner of a vessel for a balance which may be due him. "Opinions," said Judge Hopkinson, "have differed on this point, and it appears to me that the better opinion is against this doctrine. I should be disposed to follow the opinion of Lord Eldon in the case of Young *Ex parte* (*supra*), as Chancellor Kent did on this question in the case of Mumford v. Nicoll, although a majority of the Judges in the New York Court of Appeals seemed inclined to support the opinion of Lord Hardwicke, in the case of Doddington v. Hallett, which was in favor of the lien." Judge Hopkinson was also of the opinion that the Admiralty had no jurisdiction to enforce such a lien, even upon the supposition that it existed.

[1] Mumford v. Nicoll, 20 John. R. 611.

[2] 2 Hill's Ch. R. 553. Upon appeal, the Court of Appeals did not deem it necessary to give an opinion upon the point discussed by Chancellor De Saussure. "The question is not really," said Chancellor Johnston, in delivering the opinion of the Court, "as it has often been conceived to be, whether a ship may be the subject of partnership; for no doubt any species of property whatever may be held in partnership. But the question is, whether a ship, owned in distinct shares, and employed in trade, is, as between the owners, partnership property, or liable to be so regarded by creditors, beyond certain specified limits." See also Hewitt v. Sturdevant, 4 B. Monroe, 458–9; Lamb v. Durant, 12 Mass. 54; 3 Kent, 38; 11 Mass. 469; 2 Mumford, 387.

390. Whatever conflict there may be in the cases with respect to the precise point in question, it seems to be generally admitted that there may be a special partnership in a ship, as well as in the cargo, in regard to a particular voyage or adventure. And hence, the repairs, outfits, and other expenses, incurred to accomplish the enterprise, are deemed to be made on joint account, and intended to be governed, as to rights and liens, by the rules of strict partnerships.[1]

391. The ordinary remedy for part-owners to obtain an adjustment of the ship's accounts among themselves is a suit in a Court of Equity. It was held by Lord Stowell that a copartner could not originate a suit for accounts in the Admiralty,[2] and that the Admiralty would not hang jurisdiction on such accounts, "upon the peg of a stipulation," taken by a dissentient part-owner, as a remedy for the loss of the ship. I am not aware that the question has ever been decided in this country. But I apprehend, that our Courts of Admiralty, possessed as they are with general equity powers, would have ample jurisdiction, in a case of that nature. Indeed, Lord Stowell did not deny that the language of the commission or patent of the Judge of Admiralty, would countenance his taking jurisdiction to enforce an adjustment of accounts among part-owners. But in declining to exercise the jurisdiction, he relied upon the fact that it never had been exercised, and that the "active

[1] 3 Kent, 40, 155; Story on Partnership, § 444. See the cases in 4 Pick. 456, and 6 Pick. 46.

[2] The Apollo, 1 Hagg. R. 306.

jurisdiction of the Court stood in need of the support of continued exercise and usage."

392. When a contract is made with two or more persons, and one only sues, the defendant may have the advantage of it on the general issue, without pleading it; *a fortiori* if it appears from the plaintiff's own showing that the contract was made with himself and others not named, nor any legal reason assigned for not naming them; because it appears that no such contract was made with the plaintiff as he has declared on. But the several part-owners of a ship make in law but one person. Hence, if an injury be done the common property, all the part-owners ought to join in an action to recover damages for that injury. And this to prevent the defendant from being harassed by a multiplicity of suits. As the rule is established for the benefit and ease of the wrongdoer, he may waive it by not pleading in abatement.

393. It is well settled that he cannot take advantage of the irregularity under the general issue. And if he does not avail himself of the advantage which the law gives him, by plea in abatement to the first suit, he is estopped from taking the exception in abatement, if afterwards another part-owner sues for his own interest. The distinction is this: in actions by part-owners arising *ex contractu*, if all the part-owners do not join, the defendant may avail himself of the objection by evidence at the trial, and without plea in abatement. But in actions arising

*ex delicto*, the non-joinder must be pleaded in abatement at the very beginning of the cause.[1]

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[1] Hart v. Fitzgerald, 2 Mass. R. 511; Thompson v. Hoskins, 11 Mass. R. 419; Addison v. Overend, 6 T. R. 76; Rice v. Shute, 5 Burr. 2611; Bloxam v. Hubbard, 5 East, R. 407; Abbott on Shipping, 146. The distinction stated in the text between actions for tort and on contract, Mr. Justice Story says, is not very easy to establish upon any general reasoning. "It seems, however," he observes, "to proceed upon this ground, that, in cases of tort, the tort is treated as joint and several; whereas, in cases of contract, the contract is treated as an entirety, and as being incapable of separation as to the plaintiffs. And yet a different rule prevails, even in cases of contract, as to the parties who are defendants in the suit; for, in the latter cases, the objection of the non-joinder of all the proper contracting parties to the contract as defendants can be taken advantage of (as in the case of torts) by a plea in abatement only, and not upon the trial of the merits." Story on Partnership, s. 454. See also Robinson v. Cushing, 2 Fairf. 480, where it was held, that one of two or more joint owners of a vessel cannot maintain an action in his name *alone* for freight, though he be also master. Converse v. Symes, 10 Mass. 377; Barn v. Morris, 3 Caines' R. 54; Jordan v. Wilkins, 2 Wash. C. C. R. 482. "The necessity," says Lord Tenterden, "of all the part-owners joining as plaintiffs in actions for the freight of goods conveyed in a general ship, is founded upon the consideration that all of them are partners with respect to the concerns of the ship; and upon this consideration Lord Chancellor Eldon, in a case of bankruptcy, wherein it appeared that the owners of a ship, upon a settlement of accounts with the master, who had become a bankrupt, were indebted to him, and that, on the other hand, he also was indebted to some of them severally upon separate and distinct concerns, refused to allow the latter to set off their respective demands against the claim of his assignees for their shares of the general debt. And although the share of each part-owner be his separate property, yet, when A., B., and C., were owners of a vessel, and B. and C. employed D. to sell it for them, which he did, and paid over their proportion of the purchase-money to B. and C., but refused to pay A. his proportion of the proceeds

394. In an action *ex contractu* against part-owners, the non-joinder of one or more must be pleaded by the part-owners sued in abatement. If they neglect to plead in abatement that others ought to be impleaded, this is a waiver of their right; and they cannot afterwards avail themselves of this variance, either on the general issue or in arrest of judgment, if the fact becomes apparent upon the record. Their remedy is against the other part-owners, for contribution.[1] If, however, persons are joined in the action who never contracted, or were not bound by the contract made with others, this goes to the foundation of the suit, and is fatal to it upon the merits, for it is a variance in substance.[2]

395. In actions against part-owners *ex delicto*, as the party injured has his election to sue all or any of them, and upon the ground that tort is, in its nature, a separate act of each individual, it follows

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of the sale of the vessel, and A. alone sued him for the amount, it was held he could not recover. For here was a joint contract; and persons having separate interests in a ship may jointly agree to authorize another to sell the entirety for them. But if several part-owners allow one of their number to deal with their joint property as his own, and he lend the proceeds of it, and receive credit for them in account in his own name, although the property was joint, his contract with the borrower may have been separate; and they must show that it was not so, if they would sue upon it." Abbott on Shipping, 149.

[1] Converse v. Symmes, 10 Mass. R. 377; Robertson v. Smith, 18 John. R. 459; Doremus v. Selden, 19 John. R. 213; Ziele v. Executors of Campbell, 2 John. Cas. 382.

[2] Livingston's Ex'rs v. Tremper, 11 John. R. 101; Jones v. Wilkins, 2 Wash. C. C. R. 482; Tone v. Goodrich, 2 John. R. 213.

that the part-owner sued cannot plead the non-joinder of the others in abatement or in bar.[1] The doctrine is well established in this country; but in England it has been much questioned, and the decisions are conflicting.[2]

396. "Part-owners of ships," says Mr. Justice Story, "are, without question, all responsible at the common law, severally, as well as jointly, *in solido*, for all torts personally committed or authorized by them, or occasioned to third persons by the negligence of one or more, or all, of them, or by that of the master of the ship, or ship's husband, or other agent thereof; but not for the wilful or malicious acts of the latter. The reason for this distinction between negligent and wilful or malicious acts is, that neither the master nor ship's husband, nor other agent, in doing such wilful or malicious acts, can properly be deemed to be acting within the scope of the authority confided to him by the owners, in the management of the ship or its concerns; but cases of negligence may, and ordinarily do, arise in the very course of such management. The doctrine is clearly illustrated in the common case of a collision, or running down of ships on the high seas, or in port, whereby damage or loss is incurred. If the tort be by the wilful or malicious act or design of the master, or any other officer or agent of the ship, the owners

[1] Low v. Mumford, 14 John. R. 426; Patten v. Gurney, 17 Mass. R. 182.

[2] Govett v. Radnidge, 3 East, 52; Powell v. Sayton, 2 New Rep. 365; Max v. Roberts, 2 New Rep. 450; Same v. Same, in Error, 12 East, 89; Weal v. King, 12 East, R. 452.

are not liable therefor, but the party only who commits the tort. But if it be by the negligence of the master, or any other officer or agent, then the owners are liable therefor *in solido*, jointly and severally. On the other hand, if a tort be committed by one part-owner of a ship, who is not employed by the others about the concerns of the ship, or authorized to act for them, but he is acting solely, *suo jure*, as part-owner, the other part-owners will not ordinarily be liable therefor, whether the act be wilful or malicious, or merely negligent, for the very reason that he is not intrusted by them with the management or concerns of the ship."[1]

397. A tradesman who has repaired a ship, and taken from some of the part-owners sums equivalent to their shares, has nevertheless a claim upon them for the residue, for which they remain responsible, if not paid by the others, unless at the time of the payment the tradesman specially agreed to discharge them from all further demand, upon some good consideration inducing him to do so.[2] We have elsewhere seen[3] that, if the credit, at the time the repairs or supplies were ordered, was given to the ship's hus-

[1] Story on Partnership, s. 458.

[2] Abbott on Shipping, p. 149.

[3] Ante, p. 380; Reed v. White, 5 Esp. 122. This was an action for cordage sold, against the defendant, as owner of the ship Princess Mary. The defendant, White, was the managing owner or ship's husband. The plaintiff took White's bill for the amount, which was dishonored, and renewed, and again dishonored. For the other defendants, it was insisted that the plaintiff had discharged the other owners, who, in ignorance of this mode of dealing between the plaintiff and White, had suffered him to receive

band, or other agent, ordering them; or if such receipt or acknowledgment was given by him, so as to enable the ship's husband or other agent to settle with the part-owners, and upon the basis of having paid for the repairs and supplies, in that case, they are discharged, and the tradesman must look to the party who has received the credit, either actually or in the eye of the law.

398. We may here add, that the underwriters upon the ship, after abandonment and acceptance, become owners. The ship passes into their hands *cum onere*, and they are liable for all necessary repairs and expenses, after the disaster which occasioned them and subsequent to abandonment. This doctrine is ob-

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large sums of the East India Company for freight, which they would otherwise have detained.

Lord Ellenborough.—If the plaintiff, dealing with White separately, has adopted him, he has discharged the others, and must have a verdict against him: it was not necessary there should have been a receipt. If he has adjusted accounts with him on that footing, the other defendants are entitled to the benefit of it. The first renewed bill is expressed to be for cordage found for the Princess Mary, and drawn only on White. If this was drawn on him, as for himself, and as agent for his partners, it was a prolongation of time as to all. The question is, whether it was intended as a settlement with him alone, and adopting him as the single debtor. A special jury of merchants found for the defendants. See also Stewart v. Hall, 2 Dow. Rep. 29.

"The civil law," says Lord Tenterden, "differs from the law of England" (i. e., in the particular stated in the text); "and while it gives an action against any one part-owner upon a contract made by the master to the full extent of the demand, it holds each chargeable only in proportion to his own share of the ship, in the case of contracts made by the part-owners themselves. By the law of Holland, the several part-owners are, in all cases, chargeable only according to their respective interests in the ship."

viously just. The underwriters are the parties ultimately benefitted by the repairs. They are entitled to the freight made after abandonment. And as they desire the benefit, they must pay the expenses, without which the benefit would not have enured to them. But it must be understood that they are not liable as joint partners, but only in proportion to their respective shares and interests in the ship. The vessel being thrown upon the insurers during a voyage, they take it for the purpose of diminishing a loss, and only with a view to sell her at the termination of the voyage. The law will not make them partners *in invitum*, nor is it necessary for the security of third persons that they should be thus regarded.[1]

399. The authorities concur in holding that one joint owner of a ship, or chattel, is not responsible to the co-owners for the careless use of it. The other owners, if not satisfied to leave it in his care, must look themselves to the protection of their own property.[2] Thus, in the recent case of Moody v. Buck,[3]

[1] The United Ins. Co. v. Scott, 1 John. R. 106; Coope v. Eyre, 1 H. Black. 37; Speering v. De Grave, 2 Vern. 643.

[2] Moody v. Buck, 1 Sandf. S. C. R. 304; Graves v. Sawcer (T. Raym. 15); Strelly v. Winson, 1 Vern. 297; Lawthrop v. Smith, 1 Hayw. R. 255; Chesley v. Thompson, 3 N. H. R. 9; Guillett v. Dossatt, 4 Martin (Louis. R.) 203. In this case, it appeared that there were joint owners of a slave; the slave ran away, and the owner then in possession made no pursuit after him, and omitted to notify the co-tenant; the latter recovered. The civil law, in this particular, differing from the common, as stated in the text. See also, Hewin v. Eaton, 1 Shepley, 193; Maddox v. Goddard, 3 Ibid. 218; Hurd v. Darling, 14 Vermont, 214; Anders v. Meredith, 4 Dev. & Batt. 199.

[3] *Supra.*

which was an action by one joint owner of a steamboat, against another joint owner, for the destruction of the joint property by the negligence of the latter, it was held, that a joint owner or tenant in common of personal property, cannot maintain an action against his co-tenant for negligence in the use of it. The civil law, however, proceeds upon a different principle, and under the same circumstances, makes the co-tenant, whose negligence in the use of the joint property has injured or destroyed its value, responsible therefor. The common law is essentially a technical system. The civil law, on the contrary, is based upon broad principles, of a universal character, and sanctioned, in most instances, by the general sense of mankind. In this country and England, it has been too much the habit to depreciate the value and importance of the civil law. But when we reflect how much indebted our jurisprudence has been for the last century to that system, that our equity and maritime law is based upon it, that it is the fountain from whence Lord Mansfield derived those principles which enlarged the foundation and illustrated the doctrines of the commercial law of England, we shall be more sparing of our censures, and more liberal of our praise.

## CHAPTER II.

### OF THE LIABILITY OF MORTGAGEES OF SHIPS.

400. It is well settled in our law that a mortgagee of a vessel, out of possession, is not liable for repairs and supplies. And it is equally well settled that the holding of a conditional bill of sale, or having the mere legal title to a vessel, does not of itself render a party liable. The law presumes the credit to be given to the party in possession acting as owner, and as long as he remains in possession, with the consent of the party holding the legal title, and manages and controls the vessel, and receives the profits, he is, for all practical purposes, the owner; especially when he is so treated by the persons doing work upon the vessel.[1]

[1] Hesketh v. Stevens, 7 Barb. Sup. Ct. R. 488; Flanders v. Merritt, 3 Id. 201; Thorn v. Hicks, 7 Cowen, 697; Ring v. Franklin, 2 Hall, 1; McIntyre v. Scott, 8 John. 159; Champlin v. Butler, 18 Id. 189; Miln v. Spinola, 4 Hill, 177; Leonard v. Huntington, 15 John. 289; Wendover v. Hodgeboom, 7 John. 308; Tucker v. Buffington, 15 Mass. R. 477; James v. Bixby, 11 Mass. R. 34; Duff v. Bayard, 4 Watts & Sergt. 240; Phillips v. Ledley, 1 Wash. Cir. C. R. 226; Cutler v. Thurlo, 20 Maine, 213; Colson v. Bondsey, 6 Greenl. 474; Brooks v. Same, 17 Pick. 441; Henderson v. Mayhew, 2 Gill's R. 393; Jones v. Blum, 2 Rich. (S. C.) R. 475; Cordray v. Mordecai, Ibid. 518. It was held, in this latter case, that where the mortgagee is sought

401. The creditor suffers no detriment from having no claim upon the mortgagee. His original remedy remains to him. He may proceed against the mortgager *in personam*, or against the ship *in rem*. So far as he is concerned, the law treats the mortgage as if it had no existence. When the mortgagee, however, holds himself out as the real owner by any sufficient acts, such as justly entitle material-men and tradesmen to regard him as the owner, he is liable in the character which he assumes. What acts of ownership will be sufficient to charge the mortgagee, must depend very much upon the facts of each case as it arises.

402. It was thought by the Court, in the case of Tucker v. Buffington,[1] that where he takes an absolute bill of sale, and representing the vessel as his property in the custom-house, takes out a new certificate of enrolment in his own name, and erases the name of the place of residence of the former owner, and substitutes his own place of residence, in such a case, that he is subjected to all the liabilities of owner, notwithstanding he may have given the former owner a written contract to reconvey the vessel on the performance of certain conditions. This, as between the parties, the Court said, would operate to make the conveyance of the vessel a mere security, but as to all the world besides an unconditional sale.

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to be charged as owner for repairs, he may give in evidence his private transactions, or course of business, in reference to the vessel, in order to show that the vessel was not under his control or navigated for his benefit, and that his connexion with her was that of agent or consignee.

[1] *Supra.*

403. And he was held not to be discharged from liability, from the circumstance that he never took actual possession of the vessel, nor received any of her earnings, nor had any care or management of her, nor any concern in manning, victualling, or employing her; nor from the fact that the grantors remained in possession, directing the employment of the vessel, and receiving her earnings. The grantee must submit to the consequences of his own voluntary acts. A tradesman, it was observed, who intends to work on the credit of the owners of the vessel, has no means of conjecturing any one to be owner, but him in whose name the vessel is enrolled; and this fact, together with the alteration on the stern, as in this case, is a better indication of the ownership than actual possession of the vessel.[1]

404. If, however, in such a case, it should appear that the repairs were done or the supplies furnished upon the credit of the mortgagors, then the mortgagee is discharged. When labor is performed upon a ship or any other chattel, the presumption naturally and legally arises, that it was done for the benefit and at the request of the owner. But this implication of law may be avoided by showing that there was an express contract for the work and the compensation, or that the work was done upon the credit of another person, without any intention of resorting to the owner. And if the legal implication can be destroyed when there is absolute ownership, *a fortiori*, it can be destroyed, when the party sought

[1] Tucker v. Buffington, 15 Mass. R. 477. But see Ring v. Franklin, 2 Hall's R. 1.

to be charged is but a mortgagee, and not generally answerable for repairs. The true test of liability is, to whom was the credit actually given ?[1]

405. As the mortgagee of a ship, although the register or enrolment may stand in his name, where he has not taken the actual possession and control, is not answerable for supplies furnished by order of the master, acting under the orders and authority of the mortgagor, it follows that the mortgagee, in such case, is not answerable for the wages of the master.[2]

406. In one case it was held, that the mortgagees of a ship, who were the registered owners, were not liable to a claim for wages by a sailor, though they accrued upon a voyage which was prosecuted for the benefit of the mortgagees, and the ship's freight and earnings during the voyage were made over to them by the same deed which conveyed the ship as a security for advances. The ground of decision was, that the sailor had made the contract on which he sued with the mortgagor, and had given credit to him: he, therefore, was liable and not the mortgagees.[3]

407. When the mortgagee has actually taken pos-

[1] James v. Bixby, 11 Mass. 34; Dame v. Hadlock, 4 Pick. R. 458; Brooks v. Bonsey, 17 Ib. 441; M'Intyre v. Scott, 8 John. R. 159; Colson v. Bonsey, 6 Greenl. 474; Champlin v. Butler, Ferguson v. Lord, 9 N. H. 380; Ring v. Franklin, 2 Hall's (N. Y.) R. 1.

[2] Cutler v. Thurlo, 20 Maine, 213; Fisher v. Willing, 8 Serg. & R. 118.

[3] Martin v. Paxon, Holt on Shipp. p. 353.

session, he then stands on a different footing. When he is in possession, and causes the ship to be registered in his own name, he is then regarded as owner, and answerable for supplies furnished and repairs made upon the ship.[1] When, too, there is an unconditional bill of sale, the purchaser is liable for supplies, though he may never have taken possession of the vessel, and though neither the master nor the merchant furnishing the supplies had any knowledge of the sale.[2]

408. It is competent, however, for the party holding the bill of sale, absolute though it be on its face, to prove that it was intended as a mortgage, and if he never took possession under it, nor by any other act held himself out as the actual owner, he will not be liable. The agreement, which operates as a defeasance, need not be under seal; nor is it necessary that it should be made or executed simultaneously with the deed, in order to give it validity. If, however, the defeasance should be executed after the bill of sale, and upon an after agreement and consideration, the party would doubtless be liable for the repairs and supplies furnished in the interval.

409. When the bill of sale operates as a mortgage, the mortgagee is not made liable by the simple fact, that he registers the vessel in his own name at the custom-house. The registration does not determine the ownership. A mortgagee may declare himself

[1] Miln v. Spinola, 4 Hill's R. 177.

[2] Lord v. Ferguson, 9 N. H. R. 380; Tucker v. Buffington, 15 Mass. 477; Portland Bank v. Stubbs, 6 Mass. 422.

the legal owner, for the purpose of the registry acts, without in any manner altering the relations existing between himself and the mortgagor. The act is open to explanation.[1]

[1] Ring v. Franklin, 1 Hall's (N. Y.) R. 1; Tucker v. Buffington, *supra;* Weston v. Penniman, 1 Mason, 318. In Ring v. Franklin, the action was brought against the defendant for work and labor, and materials found, &c., in repairing the ship Concordia, when she stood in the name of the defendant as ostensible owner, and the defence was, that the defendant was mortgagee out of possession, and therefore not answerable to the plaintiff for the repairs done by him. The plaintiff, to establish the ownership of the defendant, produced and proved the custom-house register of the ship, with the affirmation of the defendant, that he was sole owner, by which document so produced, it appeared that a new register had been issued for her on the 15th of October, 1824, her previous register, issued on the 27th of August next preceding, being then surrendered, in consequence of a change of property. The new register was issued at the request of the defendant, and upon his affirmation that he was the sole owner of the ship, and she was thereby registered in the usual form, as the sole property of the defendant. The affirmation of the defendant, when he applied for and obtained the register, was also produced, by which it appeared that he, on the same 15th of October, 1824, affirmed, in the usual form, that he then was the true and only owner of the ship, and that there was no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested therein, or in the profits or issues thereof. And it was proved that no change had taken place in the registry, intermediate the date and issuing of the same and the time the work was done. The defendant, on the other hand, read in evidence a bill of sale of the ship from N. G. Minturn to him, bearing date the same 15th of October, 1824, and being on the face of it an absolute transfer of the ship to him. He then called Minturn, the apparent vendor, to prove that the bill of sale, though absolute in its terms, was given to him, the defendant, and taken by him as collateral security for a loan of six thousand dollars made by Franklin & Minturn to N. G. Minturn, the owner of the ship.

410. The principle which governs the decisions is, that the qualified ownership created by a mortgagee, or a defeasible bill of sale, is not the cause or inducement of the credit which is given by material-men or others, nor will the law permit such qualified ownership to be a ground of liability. The creditor, if he trusts to it, must not look to the law for relief. The party must take possession, or hold himself out as the absolute owner, or he is not chargeable.[1]

411. "The owner, who is responsible, is the person

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The witness, upon his *voir dire*, declaring that he had no interest in the event of the suit, was admitted to testify, and proved the facts here stated. The absolute bill of sale was executed on the 15th of October, 1824, and the defendant afterwards, on the 29th of March following, to manifest the trust, gave a written acknowledgment as evidence of the contract.

It was held, that the defendant, under these circumstances, was not liable for repairs and supplies. See also Birkbeck v. Tucker, 2 Hill. 121. In the latter case, it was said by the Court, that "the law was well settled, that wherever there is a loan and a security furnished for that loan, the fact may be shown by parol proof, even though the instrument forming the security be absolute in its terms and upon its face. It becomes a question of intention entirely, and if the parties intended that the apparently absolute deed should in truth be but conditional, then that fact may be shown in any form of proof which can establish it. It is not necessary that the defeasance should be in writing; but the real object of the parties in forming the instrument may be proved by parol. The effect of the instrument is not confined to the immediate parties, at all events, if third persons are not prejudiced thereby. In this case, there is no pretence that credit was given to this ship, in consequence of the interest which was vested in Howland. His part-ownership in nowise prejudiced the plaintiff, and Howland cannot be made liable from this cause."

[1] Duff v. Bayard, 4 W. & S. 240.

who, having some kind of claim or title, has the control and management of the vessel, and has the right to receive her freight and earnings. And the ground of this liability seems to be the common maxim, *qui sentit commodum sentire debet et onus:* it being obviously right and just that he who enjoys the benefits of the vessel, and controls her operations, who receives her gains or has the chance of so doing, ought to pay debts incurred for the fitting out, supply, and navigation of the vessel, which is to produce for him those earnings, and not a person who merely holds a right in her without the profit or usufruct."

412. The Admiralty in England, upon questions of mortgage, has declined to entertain jurisdiction.[1] The question has not been raised in this country in such a direct form that it required to be determined. No reported case contains any decision upon the point. In the case of Leland v. The Ship Medora,[2] Judge Woodbury observed, that his impression was against the right of the Admiralty to take jurisdiction of such cases. By the Act of 3 & 4 Victoria,[3] the Courts of Admiralty in England may now decide on the rights of mortgagees to ships, if they are under arrest, or their proceeds are in Admiralty. In the latter case, I presume there could be no objection to

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[1] The Neptune, 3 Hagg. Ad. R. 132; The Dowthorpe, 2 W. Rob. 80; The Highlander, Ibid. 109; 2 Brown. Civ. & Adm. Law. 95; Atkinson v. Maling, 2 D. & E. 462; 3 Hagg. 402.

[2] 2 Wood. & M. 92.

[3] Ch. 65, s. 3.

our Courts assuming jurisdiction, in the absence of any special authority.[1]

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[1] See Gardner v. The New Jersey, 1 Pet. Adm. 227. By the Act of July 29, 1850, it is provided, "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance, be recorded in the office of the collector of the customs, when such vessel is registered or enrolled. The lien by bottomry, however, created during the voyage of the vessel by a loan of money, or materials necessary to repair or enable such vessel to prosecute a voyage, does not lose its priority, nor is in any way affected by this act." Sec. 1.

## CHAPTER III.

### OF PILOTS.

413. A PILOT is a person taken on board at a particular place, for the purpose of conducting a ship through a river, road, or channel, or from or into a port.[1] His duty, therefore, is properly the duty to navigate the ship over and through his pilotage limits, or as it is commonly called, his pilotage ground. The ship must be capable, in point of crew, equipments, and situation, of being navigated. No pilot is bound to go on board a vessel in distress to render pilot-service for mere pilotage reward. If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition, he would be subjected to no censure, and if he did take charge of her, he would be entitled to a salvage remuneration.[2] "Pilotage," said Dr. Lushington, in the case of The Elizabeth,[3] "is confined to conducting into port a

[1] Abbott on Shipping, 265; Hobart v. Drogan, 10 Peters' R. 108.

[2] The Frederick, 1 W. Rob. R. 17; The Elizabeth, 8 Jurist, 365; The Cumberland, 9 Jurist, 191; The Star, 14 Law Rep. 487; Flanders' Maritime Law, 336.

[3] 8 Jurist, 365. If, when a pilot goes on board a vessel to bring her into port, not in a state of distress, but afterwards a wind arises, and she is in danger of being cast upon the shore, it is the duty of the pilot to exert his utmost labor and skill to pre-

vessel in no state of alarm, or having no apprehension of distress arising from antecedent causes."

414. The office of a pilot is not a public one, unless expressly so constituted. Ordinarily, it is considered as a mere private profession, trade, or calling, which may be, and is in most instances, subjected to certain regulations and restraints, by the interposition of legislative authority. When the law provides for the appointment and license of pilots, they acquire a right in their pursuit, which becomes a species of property, subject, of course, to all the restrictions imposed by the law, and liable to be forfeited for any of the reasons specified by the law.[1]

415. The first Congress that assembled under the Constitution, found existing in several of the States, a system of laws for the regulation of pilots and pilotages. The Constitution has conferred on Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is admitted that the power to regulate commerce includes the regulation of naviga-

serve her; and for so doing, he cannot set up a claim for compensation as a salvor. That which a pilot does in the ordinary course of his duty, can never be made the foundation of a claim for salvage; and the difficulty and exertion being more or less in such a case, can make no difference. He takes his chance for such hazards. He knows he must be exposed to them; and it must be presumed that his official compensation is calculated on the probability of such exposures. He cannot be at the same time, and in the same act, a pilot and a salvor. When he goes beyond his official duty, he becomes a salvor. The Elvira, Gilpin's R. 65.

[1] Low v. Com. of Pilotage, R. M., Charlton's (Ga.) R. 310.

tion. The regulation of navigation means the establishment of rules by which it must be carried on. The power extends to the persons who conduct it, as well as to the instruments used.[1] The Congress of 1789, instead of proceeding under the constitutional grant to enact a general system respecting pilots and pilotages, simply adopted the laws of the several States, then existing. They became by that adoption, to every purpose, laws of Congress. But the Act of 1789,[2] not only adopted the laws of the States found existing at the organization of the government, but it went further. It declared, "That all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regu-

[1] Cooley v. Board of Wardens of the Port of Philadelphia, 12 How. R. 299. "A pilot," say the Court, "so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those engaged. And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. It is true that, according to the usages of modern commerce on the ocean, the pilot is on board only during a part of the voyage between ports of different States, or between ports of the United States and foreign countries; but if he is on board for such a purpose, and during so much of the voyage as to be engaged in navigation, the power to regulate navigation extends to him while thus engaged, as clearly as it would if he were to remain on board throughout the whole passage, from port to port. For it is a power which extends to every part of the voyage as much as in another part, or during the whole voyage."

[2] Act of 7th Aug., 1789, sec. 4.

lated in conformity with the existing laws of the States, respectively, wherein such pilots may be, *or with such laws as the States may respectively hereafter enact for the purpose*, until further legislative provision shall be made by Congress."

416. No "further legislative provision," has been made by Congress, and the question has arisen, whether the legislation of the several States, upon the subject of pilotage, since the Act of 1789, and prospectively adopted by it, is constitutional. Or, in other words, whether the power to regulate commerce delegated to Congress by the Constitution, is an exclusive power. It is admitted, that if the power exclusively belongs to Congress, then Congress cannot authorize the several States to exercise it. If the States do exercise it, their legislation is simply a nullity,—that is, upon the supposition that the power resides exclusively in Congress. All Acts under that legislation are void Acts. They bind no one. Congress may, however, adopt that legislation, and from that moment it possesses vitality. But the adoption of Congress does not impart vigor to it, and render valid Acts under it, anterior to the adoption. It does not relate back, and make valid that legislation *ab initio*. It may be added, that when the legislation of the States is adopted, it becomes the legislation of Congress, and the States thereafter have no more right or authority to modify or amend the adopted laws, than they have to amend or modify any other Acts of Congress.

417. The question now arises, whether Congress

can *prospectively* adopt the laws which the several States may hereafter enact upon the subject of commerce or any of its incidents. If so, this strange result follows,—that Congress may invite the States to legislate upon a subject exclusively within its own power (we are now assuming this to be so), with the previous guarantee that its legislation shall be sanctioned by Congress,—thus doing what the Supreme Court of the United States, in the case of Gibbons v. Ogden,[1] declared that Congress could not do, namely, authorize or enable a State to legislate. If this is so, it follows that all the laws of the several States, passed since the Act of 1789, are void, unless the States possess a concurrent power over the subject of commerce, or the laws are in their nature police regulations, which, it is admitted, the States have a necessary and legitimate power to enact.

418. The latter branch of the alternative does not fall within the scope of our inquiry. The former meets us at the threshold. The question is a simple one. Have the States concurrent power with Congress over commerce and its incidents? If they have, then the laws of the States with respect to pilots and pilotages are valid.[2] "The grant of com-

[1] 9 Wheat. R. 218.

[2] In 1803, Pennsylvania passed an Act "to establish a Board of Wardens for the port of Philadelphia, and for the regulation of pilots and pilotages," &c. One section of the Act provides "That every ship or vessel arriving from or bound to any foreign port or place, and every ship or vessel of the burden of twenty-five tons, or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six

mercial power to Congress," says Mr. Justice Curtis, in the case of Cooley v. Board of Wardens, &c., "does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power thus granted to

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hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to the port. And when any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the Capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of sixty dollars. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to the warden aforesaid a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, &c., to be recovered as pilotage in the manner hereinafter directed: Provided always, that when it shall appear to the warden that, in case of an inward-bound vessel, a pilot did not offer before she had reached Reedy Island, or, in case of an outward-bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid for not having a pilot, shall not be incurred." In affirming the validity of this Act, the Supreme Court of the United States (Justices M'Lean and Wayne dissenting), in the case of Cooley v. Board of Wardens, &c., 12 How. R. 299, said: "We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established, by making regulations, or by intentionally leaving individuals to their own unrestricted action."

Congress requires that a similar authority should not exist in the States."

419. When a power is expressly granted to Congress, the presumption is, that it was deemed necessary that it should exclusively reside in Congress. The Constitution does not declare that if time and experience demonstrate that the "nature" of any of the granted powers is such that they may be exercised by the States, then the States are at liberty to exercise them. The Constitution cannot intend, when it confers on Congress the power "to regulate commerce," to enable the States to exercise it whenever Congress does not. It is admitted that, when Congress exercises the power, the States cannot. It then becomes exclusive. But when Congress "sleeps upon its post," the States may seize its armor, and exercise its authority. The laws which the States enact during the somnolency of Congress, the Supreme Court says, are valid. They certainly are, if enacted within the admitted sovereignty of the States, and must continue so, notwithstanding they may conflict with any subsequent legislation of Congress.

420. "Can Congress," asks Mr. Justice M'Lean, in his dissenting opinion, "annul the acts of a State passed within its admitted sovereignty? No one, I suppose, could sustain such a proposition. State sovereignty can neither be enlarged nor diminished by an Act of Congress. It is not known that Congress has ever claimed such a power." Yet the majority of the Court, in the case of Cooley v.

Board of Wardens, &c., assumed that the State laws might at any moment be overruled by the action of Congress. We shall pursue the argument no farther. The question, by the judgment of the Supreme Court, is settled. And it now must be understood that the laws of the several States, for the regulation of pilots, "are enacted by virtue of a power residing in the States to legislate," and are valid until Congress interposes, and establishes some other system of regulations.

421. The Admiralty has jurisdiction, as well *in personam* as *in rem*, for pilotage services. They properly arise under a maritime contract, and differ in no substantial respect from the contract for mariners' wages.[1] And since the Act of 1845, extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same, it is not necessary, in order to give the Admiralty jurisdiction, that the pilotage should be due for services performed on, from, or to the sea.

422. That Act declares that the District Courts shall have, possess, and exercise, the same jurisdiction in matters of contract and tort, arising in or upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories, as was at the time of the passage of the

[1] The Anne, 1 Mason's R. 508; Hobart v. Drogan, 10 Peters' R. 108.

law possessed and exercised by the District Courts in cases of like steamboats and other vessels employed in navigation and commerce on the high seas, or tide-waters within the Admiralty and maritime jurisdiction of the United States. We have elsewhere seen that the Supreme Court of the United States has affirmed the constitutionality of this enactment.[1]

423. Although by the Pennsylvania Act of 24th February, 1820, the penalties denounced by the Act of 29th March, 1803, that is, the half-pilotage fees, are put upon the same footing as the claims of material-men, against domestic ships, in regard to which United States Courts have always felt themselves authorized to take jurisdiction, yet Judge Kane, in the case of The Creole,[2] said he had not sanctioned the use of Admiralty process to collect them. He said that Courts of Admiralty, like Courts of Equity, refused their aid to the enforcement of penalties, even such as are imposed by law for a breach of contract strictly within their cognizance. He intimated, however, that he might hereafter recognise the half-pilotage lien created by the Pennsylvania Pilot Act, as one to be enforced by Admiralty process, but he did not deem it necessary to consider the question in the case before him.

424. To relieve the commerce of the country from any embarrassment, arising from the laws of diffe-

[1] The Propeller Genesee Chief v. Fitzhugh, 12 Howard's R. 443.

[2] Leg. Intell., May 7th, 1852.

rent States, situate upon waters which are the boundary between them, Congress has provided that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port, situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary, notwithstanding.[1]

425. By the laws of most maritime States, masters of vessels are compelled to take pilots on board.[2] While on board, the pilot is considered as master, *pro hac vice*. He has absolute and exclusive control of the ship. If the master is bound by any law to take a pilot on board, he, as well as the owners, are exempt from liability for any damage arising from the neglect, default, or incompetency of the pilot.[3] This

[1] Act of March 2, 1837.

[2] Vide, Laws of Oleron, Art. 23; Molloy, B. 2, ch. 9, § 3 and § 7.

[3] The Protector, 1 W. Rob. Ad. R. 45; The Christiana, 2 Hagg. Ad. R. 183; The Lochlibo, 1 Eng. Law & Eq. Rep. 651; Carruthers v. Sydebotham, 4 Maul. & Selw. 77; Snell v. Rich, 1 Johns. R. 305; Mackintosh v. Slade, 6 Barn. & Cressw. 657; Opinion of Judge Kane in the case of The Creole, The Legal Intelligencer of May 7, 1852; The Maria, 1 W. Rob. R. 95. But see *contra*, Bussey v. Donaldson, 4 Dall. R. 206; Yates v. Brown, 8 Pick. 23; The Transit, cited in the case of The Protector, 1 W. R. 45; The Neptune, 1 Dod. R. 467. The ground upon which the Court proceeded in Yates v. Brown, was, that the pilot is the agent of the owners, and therefore the owners are equally liable for his acts, within the scope of his employment, as for the acts of the master done within the scope of his employment.

rule is founded upon considerations of obvious justice. When the appointment rests with the owner himself, as in the case of the master and crew, it is reasonable that he should be held responsible for their acts, who are agents selected by himself; and he is bound to provide persons of adequate skill, diligence, and sobriety.

426. But when a person is compulsorily put on board the vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety, and caution of an individual with respect to whom he has no power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others: the owner himself being entirely debarred from any possibility of interference.[1]

[1] The Protector, 1 W. Rob. Ad. R. 45; Dr. Lushington; The Maria, Ibid. 95. It should be here observed, that while the reasoning of Dr. Lushington in both of these cases, and in the subsequent case of The Agricola, 2 W. Rob. R. 10, proceeds upon the general principle that no man should be held responsible for the acts of an agent, who was forced upon him by the provisions of law, it must, at the same time, be understood, that owners and masters are specially exempted from liability by the Act of Parliament of 6 Geo. IV., c. 125, s. 55. However, "I am of opinion," said Dr. Lushington, in the case of The Maria, "that independently of the express provisions in those statutes, the compulsory taking of a pilot does, upon general principles, relieve the owner from all responsibility for his acts. The principle is one that is recognised by common sense and justice all over the world." This is the provision of 6 Geo. IV., "And be it further enacted, that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever,

427. In the case of The Girolamo,[1] the accident did not arise from any act of bad steerage, want of knowledge of shoals, or any incapacity of the pilot, but from the vessel going on in a fog. The question was raised whether the master was not *in pari delicto*, from not having interposed, and brought the vessel up. "It seems to be nearly admitted," said Sir John Nicholl, "that if the vessel had set off in this fog, blame would have been imputable to the master; if so, was he not blamable for going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners and other persons, whose property might be damaged by a collision, to insist on bringing the vessel up? If he was in as much haste to get out of port as the pilot was to finish his job, are they not *in pari delicto?* Was not the master in duty bound, at least, to remonstrate with the pilot, and to represent the danger of proceeding? Yet he says in his affidavit, he did not in the least interfere. In this respect, the case is, as far as I am aware, new, and one of too much difficulty to arrive at any hasty decision upon, unless there be no other points upon which the case may be disposed of."

428. The point thus left undecided by Sir John Nicholl, although it is evident that the leaning and

from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot, acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this Act, *where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof.*"

[1] 3 Hagg. Ad. R. 169.

bearing of his mind was that the master would be responsible, for not having interfered under the circumstances, has recently been adjudicated by Dr. Lushington, in the case of the Lochlibo.[1] In that case, it was held, that when a pilot is taken on board, it is his duty, and not that of the master, to determine where, and whether or not, the ship shall be brought up. Referring to the case of The Girolamo, Dr. Lushington proceeded to say:

429. "I am bound to tell you what is my own opinion. I am bound to tell you, looking at this case, whatever might be the decision in the one already referred to, I am of opinion, that where a pilot is taken on board at Dungeness, for the purpose of navigating a vessel to Margate or Gravesend, or wherever it may be within his pilot grounds, it does appear to me that all the responsibility attaches on the pilot under all the circumstances; it is not part of the duty of the master to interfere or determine whether the vessel ought to be brought up at the North Foreland, or in the Downs, or in Margate Roads; but that is clearly a part of the vocation of

[1] 1 Eng. Law & Eq. R. 651. See also The Maria, 1 W. Rob. 110; The Duke of Manchester, 10 Jurist, 865. It was held in this case to be the duty of the master to look after the pilot where there was palpable incompetency, or intoxication, or a loss of his faculties; and *semble*, if the master see that the pilot is incompetent, he is not blindly to follow his orders. In the case of U. S. v. Forbes, Crabbe's R. 558, it was held, that the pilot is an officer of the ship when on board in the exercise of his duties, but the captain is still master of the vessel, and the pilot's orders are considered as the captain's. See also, to the same effect, U. S. v. Lynch, 2 N. Y. Leg. Obs. 51.

the pilot, and I cannot consider that in this case the master was to blame. Even suppose you should consider the pilot was to blame for not having brought up the vessel, it appears to me it would be a most dangerous doctrine, considering the duty imposed upon pilots, and the local knowledge they are supposed to possess, if I was to sanction the interference of the master, in any way, in the performance of a duty, which duty they ought to be competent to discharge, and with respect to which the master, in the majority of cases, must be a very inferior judge to the pilot. Of course I do not mean to go the extraordinary length of saying, that, if it was quite manifest that the pilot was utterly incapable, it would not be the duty of the master to interpose for the preservation of life and the property under his care; for I will ever hold the doctrine that it would be his duty in the extreme case."

430. Interference, as distinguished from suggestion, is the doing that which the pilot alone ought to have done.[1] A hail from any of the crew on the look-out to alter the helm, if such advice be adopted by the pilot as a proper measure in his own judgment, will exonerate the owners; but it would be otherwise if the advice were adopted by the pilot unthinkingly, and on the mere report of the look-out.[2]

431. When a vessel is at sea, and a pilot puts off, there is, under the provisions of the Pilot Acts, a compulsion upon the master to receive such pilot,

[1] 1 Eng. Law & Eq. R. 651. [2] Ibid.

if he be the first that presents himself. But when vessels are lying in port and about to sail, the masters and owners have the right to select their own pilot, provided he be duly qualified to conduct the vessel. And although he may be under a permanent engagement to conduct certain vessels out of port, the owners are not responsible for accidents occurring while the vessel is under his charge. It has been contended that they are justly liable in such a case, because the pilot is to be considered rather as a servant, voluntarily engaged by the owners, than as an ordinary pilot taken under the compulsory provisions of the statute.

432. But a contrary view of the subject is taken by the Courts. There is nothing in the Pilot Acts, no restrictive enactment to prevent any individual duly qualified from accepting or undertaking a constant and permanent engagement. And it is considered highly advantageous, not only to the owners of vessels, but to the public at large, that the same pilot should be constantly employed on board a vessel, inasmuch as he becomes thereby well acquainted with the master and crew, and is consequently more likely to conduct the vessel amicably and properly.[1]

433. It should be observed, that when the pilot has assumed the charge of the ship, the exclusive command is his, and the exclusive duty to decide upon the proper time, place, and manner in which the anchor should be dropped.[2] "If the pilot, then, is

[1] The Batavia, 2 W. Rob. Ad. R. 407.

[2] The Agricola, 2 W. Rob. Ad. R. 10; The Gipsey King, Ibid. 547.

to decide the mode of anchoring a vessel, it seems to follow as a necessary consequence," said Dr. Lushington, in the case of The Gipsy King,[1] "that the pilot is responsible to see that the anchor is in a proper situation to be dropped when necessary. The crew are under his superintendence and direction, and bound to execute his orders." This is true, but the reasoning is not altogether satisfactory. The position is a sound one, that the mode, the time, and the place of bringing a vessel to an anchor, is within the peculiar province of the pilot who is in charge.

434. But is it not the duty of the master to have the anchor in a proper situation, so that the order of the pilot to drop it, may be at once executed? The vessel must be properly equipped, or rather, be sufficient in point of equipments to be conducted over the pilotage grounds. But suppose there is no anchor on board, and a collision arises from its absence. Clearly, the pilot is not responsible in such a case. Now, on the other hand, suppose that the anchor is in such a situation that it cannot be used. Can it be said that the vessel is sufficient in point of equipments, while the anchor is in that predicament?

435. The question simply is, whether it is the duty of the master and crew to have the means of conducting the vessel into port, and anchoring her, in a suitable condition to be employed under the direction of the pilot, or whether that duty devolves upon the latter. It seems to us, that justice and common sense agree upon this point, and should pre-

[1] 2 W. Rob. Ad. R. 547.

scribe the rule of law. We think that it is manifestly the duty of the master to see that the anchor is in a proper condition to be used, and that the pilot is exonerated from any liability for damages that may ensue, from its not being in a proper condition to be dropped when necessary.

436. A vessel in charge of a licensed pilot, whilst in tow of a steam tug, is, under ordinary circumstances, to be considered as navigated by the pilot in charge. If the course pursued by the steam tug is in conformity with his directions, and a collision takes place, the pilot is responsible, and not the owners of the vessel or of the steam tug. If, however, the steamer disregarded the directions of the pilot, and the collision was occasioned by her misconduct, the owner of the ship, in that case, would be responsible, as for the acts of their servant; and they must seek their redress against the owners of the steam tug.[1] It should be added, as a proper qualification of the general doctrine, that although the course pursued by the steam tug is in conformity with the directions of the pilot, he will be exonerated from liability, if it can be made to appear that he acted with good faith and with his best judgment, that he betrayed neither carelessness nor ignorance, but simply misjudged or miscalculated in circumstances where the most prudent man might have erred. It is not uncommon for the best and wisest designs to miscarry.[2]

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[1] The Gipsy King, 2 W. Rob. Ad. R. 537, 542.

[2] The Constitution, Gilpin's R. 579.

437. The owner being discharged from liability for any mischief or damage occurring from the neglect, default, or incapacity of a qualified pilot, in charge of a vessel, it would seem necessarily to follow, that the ship itself is discharged. It seems a contradiction in terms to say that the owner cannot be held answerable for the acts of an agent of the law, but the owner's property may be. Yet that was the principle declared by Sir John Nichol, in the case of The Girolamo.[1] The Girolamo was a foreign vessel, which left the London Docks with a licensed pilot on board, towed by a steamer. After she had passed Blackwell, a fog came on, during which she ran foul of the Edward, a British convict vessel, moored a little below Woolwich, in the proper berth for such vessels. The Girolamo was arrested, and gave bail in £200.

438. Sir John Nichol said it could not be doubted that, before the passage of the Acts of Parliament,[2] upon which the respondents relied, exonerating masters and owners when a licensed pilot is in charge of the vessel, the remedy *in rem* existed in the Court of Admiralty, and the legislature had not in express terms taken it away. And he sustained the proceeding *in rem* against the vessel.

439. The same question came before Judge Kane, in the case of The Creole,[3] and was decided upon a

[1] 3 Hagg. Ad. R. 169.

[2] 6 Geo. 4, c. 125; 1 and 2 Geo. 4, c. 75, s. 32.

[3] Legal Intelligencer of May 7, '52, Eastern District of Pennsylvania. Since the text was written, we have understood that

principle more in conformity with law and common sense. "There can be no liability," said his Honor, "for collision, where there has been no wrong: the foundation of the demand against the owner *in personam*, or the vessel *in rem*, is that he, or his representative, had the power to prevent the wrong. The master is the owner's representative; for the owner selects him, and substitutes him for himself, or does without him, if he pleases, and takes the command in person. *Qui facit per alium*, &c., explains this liability very perfectly. But it never has been held, that the ship-owner should answer for the conduct of a prize-master, or the piracies of a revolted crew;—nay, not even for their contracts, though made for the benefit of the ship;[1] and for the simple reason that there is no such thing as a representative *in invitum*, and no such thing as liability for the acts of a stranger. The pilot, if it is the law that places him in charge of the vessel, is as little the owner's representative as the marshal is, who holds her in possession under a writ of attachment. . . . . For the present case it is enough to say, the *vis major* of the law must be esteemed as effective as any other in absolving both the ship and her owner; and that, therefore, whether the vessel can or cannot be regarded, in any case, as the subject of an independent liability, she can never be regarded as liable for the consequences of an act done under legal compulsion."

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the Circuit Court of the United States has reversed the decision of Judge Kane, and held that, although the vessel is in charge of a licensed pilot, and the injury arises from the fault of the pilot alone, still, the vessel is bound *in specie* to answer for the damage.

[1] The Ann, 1 Mason's R. 508–513.

440. There can be no doubt as to the duty of the master engaged in a foreign trade to put his ship under the charge of a pilot, both on his outward and homeward voyage, when he is within pilotage limits.[1] This is a duty he owes to his owners; and if he fails to take a pilot, when he might have obtained one, and grounds, the underwriters are discharged.[2] But,

[1] The William, 6 Rob. 316; Law v. Hollingsworth, 7 T. R. 160; 3 Kent's Com. 175.

[2] Phillips v. Headlam, 2 B. & Adol. 380; M'Millan v. U. Ins. Co., 1 Rice's S. C. R. 248. In this case it was held that where the master fails to employ a pilot to navigate a vessel, in coming into or leaving a port where it is customary to do so, and a loss happens in consequence of a pilot not having been employed, the underwriters upon a policy on the cargo would be discharged. But if the vessel pass uninjured through the dangers to avoid which a pilot is usually employed, and the loss happens at a point beyond which the pilot's services cease to be necessary, the assured would be entitled to recover. The true principle was said to be this: if a vessel without a pilot sustain injury in entering or leaving a harbor where it is customary to have a pilot, that then such injury does not come within the perils insured against. It is not a peril of the sea; it is a loss from the bad navigation of the vessel, and is to be set down to the fault of the master, and, consequently, the owners would be liable for it. The general rule is, if the owners would not be liable for the loss, that then the insurers are.

In the case of Flanigen v. Washington Ins. Co., 7 Barr's R. 306, it was held that the Pilot Law of Pennsylvania did not create a statutory seaworthiness. And therefore a policy of insurance on an outward-bound vessel is not avoided by reason of not having on board a pilot, although a loss occurred in pilot-ground in the bay, and at the time of the voyage there was an establishment of pilots at the port of departure, and the Act of 1803 required such a vessel to take a licensed pilot, or forfeit a sum equal to half-pilotage. The Court, however, did not deny that if a vessel sails from a port where there is an establishment of pilots, and the

aside from the duty the master is under to the owners, of taking a pilot, it has been doubted whether a foreign ship is compellable, under the usual provisions of pilot laws, to take a pilot.[1] The general English law makes no distinction, whatever may be the case under some of the British pilot laws, between foreign and domestic ships; and the compulsory provisions of our Pilot Acts apply equally to foreign as to domestic ships. The Pennsylvania Act of 1803 mulcts foreign vessels in special liabilities.[2] It should be also observed that the neglect to

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nature of the navigation requires one, it is his duty to take a pilot on board. This, as a general proposition, was admitted to be true. It required, however, the Court said, to be received with some qualification. "It is not necessary," observed Rogers, J., "in all cases, to take a pilot, without regard to the burden of the vessel or the nature of the trade. In 1 Emerigon, p. 402, it is laid down that a captain who knows the place to which he is bound is not obliged to employ a coast-pilot. These matters must be regulated by the custom of the port; and hence the necessity of inquiring into the custom, which can be done only through the medium of a jury. Is it customary or necessary for a vessel engaged in the coasting trade, of the burden of the one in question, to take a pilot, when the master, in the opinion of the owner, has competent skill to conduct her to the ocean? That the river and bay of the Delaware is pilot-ground for all vessels engaged in the foreign or coasting trade, is most true; but it is made so, not by force of the Act of 1803, but by the usage of the trade or port. It is coeval with the settlement of the province, or, at any rate, existed, and was judicially known, long before the passage of the Act in question. That the usage may be modified by statute may be conceded, but not to the extent of creating a statutory seaworthiness." Vide the case of Bolton v. Am. Ins. Co., reported in 3 Kent's Com. 176, note; and Keeler v. Firemen's Ins. Co., 3 Hill's R. 250.

[1] The Girolamo, 3 Hagg. Ad. R. 175.

[2] The Legal Intelligencer, May 7, '52.

take a pilot, when it ought to be done, will subject the owners to a suit for the damages that may happen to shippers and others by such default.[1]

441. It is not sufficient for the owners of a vessel doing a damage to allege merely that there was a licensed pilot on board, and upon that simple averment to claim exemption from liability, unless the other side can prove the damage not to have arisen from the fault of the pilot. They are bound to prove that the pilot was actually directing the course of the vessel. "The general liability of vessels doing damage," says Dr. Lushington, in the case of The Protector,[2] "remains as it was. The ancient rule of the Admiralty and common law are not abolished. The effect of the Act is merely this, that the liability is restricted to certain cases, and the extent of that liability limited to the value of the ship and freight. But the great principle that a wrong-doer is responsible to the injured party, saving in the excepted cases, continues unaltered.

442. "Is it not incumbent, then, upon the parties who claim an exemption from a general liability by reason of a special legislative enactment, to show the grounds on which the exemption is claimed; and if, as in these cases, the exemption is rested upon the fact that the accident was the fault of a pilot on board, are they not bound to prove the misconduct

[1] M'Millan v. Ins. Co., 1 Rice (S. C.), 248; Keeler v. Firemen's Ins. Co., 3 Hill, 250; 3 Kent's Com. 176, note; Abbott on Shipping, 280.

[2] 1 W. Rob. R. 45.

of that pilot? Can the Court infer, in all cases, that a collision arises from his fault? It may be accidental, or arise from the fault of the master or mariners, or even from some defect of the vessel itself. How can I, then, throw the *onus probandi* on the owners of the vessel which has received the damage? It is almost impossible they could prove it. The accident, in cases of this kind, most frequently occurs in the darkness of the night. In such cases, then, how is the owner of the suffering vessel to prove that the collision arose from the fault of the master, or the neglect or misconduct of the crew on board the vessel by which the damage is occasioned? He has no means of so doing; and it would, I conceive, be an aggravation of the injury, if this Court were to impede the attainment of his redress, by imposing demands upon him which, in the majority of instances, he would be wholly unable to satisfy."

We cannot but think that these considerations are conclusive, and should outweigh the opposite decisions, in Bennett v. Moita,[1] Ritchie v. Bousfield,[2] and in The Christiana,[3] where Sir C. Robinson appears to have adopted the doctrine of the first two cases.

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[1] 7 Taunt. R. 258. [2] Ibid. 309. [3] 2 Hagg. Ad. R. 183.

## CHAPTER IV.

### OF THE CONVEYANCE OF PASSENGERS.

443. The authority of a master at sea is necessarily summary and often absolute. All on board are subject to his authority, and within its scope are bound by it.[1] Whatever is necessary for the security of the

[1] Chamberlain v. Chandler, 3 Mason's R. 242, 245. "For the time," said Judge Story, in this case, "the master exercises the rights of sovereign control; and obedience to his will, and even to his caprices, becomes almost indispensable. If he chooses to perform his duties, or to exercise his office, in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force; and, therefore, in a limited sense, he may be said to hold the lives and personal welfare of all on board in a great measure under his arbitrary discretion. He is nevertheless responsible to the law; and if he is guilty of gross abuse and oppression, I hope it will never be found that Courts of justice are slow in visiting him, in the shape of damages, with an appropriate punishment."

By the Act of Congress of May 17, 1848, chap. 41, sec. 5, it is provided that the captain of any vessel, whether of the United States or any other country, having sufficient capacity, according to law, for fifty or more passengers (other than cabin passengers) employed in transporting such passengers between the United States and Europe, is authorized to maintain good discipline, and such habits of cleanliness among such passengers, as will tend to the preservation and promotion of health; and to that end he is required to cause such regulations as he may adopt for this purpose to be posted up, before sailing, on board such vessel, in a place accessible to such passengers, and shall keep the same so posted up during the voyage.

vessel, the discipline of the crew, the safety of all on board, the master may lawfully require, not only of the ship's company, who have expressly contracted to obey him, but of those also whom he has engaged to carry to their destination on the implied condition of their submission to his rule.[1] On the approach of an enemy, he has a right to assign passengers on board a station, which it is their duty to accept.[2] This is but an example of the application of the general doctrine, that a passenger is bound to do works of necessity for the general security, and for the preservation of the lives of all on board.[3]

444. And for his services he is entitled it seems to remuneration. The reason assigned is, that except under peculiar circumstances, the passenger is at liberty to give up his passage and quit the ship. Hence, if he remains to assist the ship in her distress, and at the risk of his personal safety, he does so voluntarily, and may, therefore, be entitled to remuneration. Yet, in a case where the ship is attacked, where the passenger has no means of leaving her, and would have no right to quit her, even if he had, in such a case, where he is compelled to remain and assist in the defence of the ship, he will be entitled, it is said, to prize money. So that

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[1] Abbott on Shipping, p. 282.

[2] Boyce v. Bayliffe, 1 Camp. N. P. R. 58; Same v. Douglass, Id. 60.

[3] Newman v. Walter, 3 Bos. & Pull. 612. It was held in this case that a passenger may become a salvor. Vide, also, to the same point, The Two Friends, 1 Rob. Ad. R. 285; The Beaver, 3 Rob. Ad. R. 292; The Joseph Harvey, 1 Id. 306.

his right to remuneration does not in all cases depend upon the fact, whether his services were voluntary or not.[1]

445. The contract for the conveyance of passengers on the high seas, or on the navigable waters of the United States in steamboats, and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories, is a maritime contract, and a subject of Admiralty jurisdiction.[2] Hence, on a breach of a passenger contract, and damage resulting, the ship, as well as the owner, is bound to respond, and all the reasons in the maritime law for charging the ship in case of the breach of a contract of affreightment of goods and merchandise, apply with equal force in the case of the breach of a passenger contract, and the one is as much the appropriate subject of Admiralty jurisdiction as the other.[3]

446. If the contract stipulates that the carrier will convey the passenger to a designated port, and, without the consent of the passenger, or any default or neglect on his part, he is carried to a different port, no recovery can be had for the amount of the

[1] Newman v. Walters, 3 Bos. & Pull. 612.

[2] The Propeller Genesee Chief, 12 How. 443; The Aberfoyle, Blatchford's R. 360; The Pacific, Id. 569; The Creole, 2 Whart. Dig. 655; The Achsah, Ibid.; Chamberlain v. Chandler, 3 Mason. 242.

[3] The Aberfoyle, 1 Blatchford's R. 360; The Pacific, Id. 569.

passage-money. On the contrary, the passenger may recover of the carrier any damage he may have sustained from this breach of the contract. If the contract itself specifies a certain sum, as the penalty to be incurred upon a failure to perform the conditions of the contract, and those conditions are not performed, the penalty is thereby forfeited, and may be recovered. But if there is a part performance, the penalty may be modified accordingly.

447. Hence, when a passenger advances half the sum stipulated in the contract, which has a penal clause of one thousand dollars in case of failure, and the other party fails to complete his part, the passenger cannot recover back the sum advanced and the penalty too; he can only recover the penalty.[1] When the contract is express, the parties must be governed by its terms. The usage of the particular trade, however, will be taken into consideration, in the interpretation of those terms. If the contract is not express, it may also be evidenced by such usage.[2]

448. If the time of sailing forms an essential part of the contract, and is not complied with, the shipowner cannot recover the passage-money, but is responsible for the damage the passenger may have sustained from his non-performance. If, on the contrary, the time of sailing is not a real and essential

[1] M'Gloin v. Henderson, 6 Lou. R. 715; La. Code, Ar. 2123; Pothier on Ob., No. 342.

[2] Abbott on Shipp., 284; Gillan v. Simpkin, 4 Camp. N. P. R. 240; Andrew v. Moorhouse, 5 Taunt. R. 435.

part of the contract, but only matter of representation while the negotiation is going on, in that case there is a compliance with the contract, if the ship sails in a reasonable time.[1] When the day is fixed for the ship to sail, and the passenger has paid the price of his passage, but, owing to his misfortune or neglect, without any laches being imputable to the master or owner of the ship, is left behind, he cannot recover back the passage-money. The principle "Empty for full" is equally applicable to this case as to the case of freight where no cargo is put on board according to agreement.[2]

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[1] Yates v. Duff, 5 Car. & P. 369.

[2] 1 Peters' Ad. R. 297, note. "Near forty years ago," says Judge Peters, "in my outset at the bar, I brought *indeb. assump.* for money had and received, &c., against the master of a ship, for ninety guineas paid, in advance, by a gentleman, for himself and others, who took the cabin, and agreed for their passages from an outport of England to Philadelphia. The day for going on board had been fixed by the parties. The passengers loitered on their route from London, and did not arrive at the port appointed until the ship had departed. The case turned out to be as before stated, though conceived by my client to be otherwise, as to the day fixed. Such of the stores as were in preservation, and laid in by the passengers, were returned. I failed in the cause. The passage-money was held to be legally retained, among other reasons, on the principle mentioned in the above case (The Brig Cynthia); namely, that freight is earned, 'empty for full,' when the disappointment is owing to the misfortune or neglect of the freighter, and no laches are imputable to the master or owner of the ship. In this case, it appeared that the wind, which had been adverse, veered to a point favorable to the ship's departure from the Downs, and afforded an opportunity which could not, at that season of the year, be justifiably neglected. She had waited three or four days after that agreed on." Vide, with respect to passenger contracts, Mulloy v. Backer, 5 East, 316; Siordet v. Brodie, 3 Camp. N.

449. A contract to carry passengers differs from a contract to carry goods. For the goods, the carrier is answerable, at all events, except the act of God and the public enemy. But, with regard to passengers, his undertaking and liability goes only to this extent, namely, that he, or his agent, shall possess competent skill, and that, as far as human care and foresight can go, he will transport them safely. Hence, he is bound for defects in the means of conveyance, if they might have been discovered and remedied upon the most thorough and careful examination of the vehicle; but he is not liable for accidents happening from an internal and hidden defect, which a thorough and careful examination could not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight.[1]

449 a. Carriers, engaged in the business of con-

P. R. 253; Young v. Fewson, 8 Car. & P. 56; Prendergast v. Compton, Ibid. 454.

[1] To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, and not as a casual occupation, *pro hac vice*. A common carrier has therefore been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him from place to place. Story on Bailments, 322; See The Huntress, Davies' R. 82; Citizens' Bank v. Nantucket Steamboat Co., 2 Story's R. 16; Christie v. Griggs, 2 Camp. 79; Aston v. Heaven, 2 Esp. R. 533; 2 Kent, 466; Boyce v. Anderson, 2 Peters, 150; Stokes v. Saltonstall, 13 Id. 181; Stockton v. Frey, 4 Gill. 408, 423; Ingalls v. Bills, 9 Metcalf, 1.

veying goods and passengers, are bound to receive passengers on board, if they have suitable accommodations, and there is no reasonable objection to the character or conduct of the person applying for a passage. The right of passengers to a passage on board of a steamboat is not an unlimited right. It is subject to such reasonable regulations as the proprietors may prescribe, for the due accommodation of passengers, and for the due arrangements of their business. They have the right, also, to consult and provide for their own interests in the management of such boats, as a common incident to their right of property. They are not bound to admit passengers on board who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct, or who make disturbances on board, or whose characters are doubtful, or dissolute, or suspicious, and, *à priori*, whose characters are unequivocally bad. Nor are they bound to admit passengers on board whose object is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them.[1]

450. As passengers are bound to obey the orders and regulations of the proprietors, unless they are oppressive and grossly unreasonable, whoever goes on board, under ordinary circumstances, impliedly contracts to obey such regulations, and may be justly refused a passage, if he wilfully resists or violates them.[2] If a passenger should use threats of personal violence towards the captain, he may ex-

[1] Jencks v. Coleman, 2 Sum. R. 221, 224; Citizens' Bank v. Steamboat Co., *supra*.

[2] Ibid.

clude him from the table, and require him to take his meals in his own private apartment. If the husband be excluded from the cuddy-table, and the wife, not from compulsion, but from a wish to be with her husband, take her meals with him in private, this will not amount to a breach of contract on the part of the captain so far as regards the wife.

451. The contract of passengers is not for mere ship-room, and personal existence on board; but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evil without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further: it includes an implied stipulation against general obscenity,—that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors, by the excitement of terror, and cool malignity of conduct, to inflict torture upon susceptible minds. The law gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case, the contract of the passengers for the voyage is, in substance, violated; and the wrong is to be redressed as a cause of damage.[1]

[1] Chamberlain v. Chandler, 3 Mason, 242, 246. "I do not say," observed Judge Story, "that every slight aberration from propriety or duty, or that every act of unkindness or passionate

452. Where a person agrees for a cabin passage, and pays his passage, he is entitled to the benefit of his contract. If, therefore, he is excluded from the cabin, the owner of the vessel is responsible in damages. And it is no defence to an action for the injury, that, when the passenger goes on board, he is told by the master that he is unable to lodge him in the cabin, and proposes that he should forbear taking his passage on board, or stay with his baggage on deck. No proposition of this nature can absolve the owners from the obligation to accommodate him in the cabin, together with his baggage.[1]

453. Formerly, it was the received doctrine that

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folly, is to be visited with punishment; but, if the whole course of conduct be oppressive and malicious,—if habitual immodesty is accompanied by habitual cruelty,—it would be a reproach to the law if it could not award some recompense." In the case of Young v. Fewson, 8 Car. & P. 56, which was an action against the captain of a ship for not furnishing good and fresh provisions to a passenger on the voyage, Lord Denman, in his address to the jury, said: "I think the result of the whole is, that the captain did not supply so large a quantity of good and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain who does not provide all that he ought. You must be satisfied that there was a real grievance sustained by the plaintiff."

[1] St. Amand v. Lizardi, 4 Lou. R. 243. An agreement between the master of a vessel and a passenger, that the latter shall remain on board until he has paid his freight, is lawful. He cannot plead, as a set-off, that the master did not furnish the provisions which he stipulated. These are mutual covenants, in which each party may have an action. Com. v. Shultz, Bright. R. 29.

the carrier, whether by land or water, was not liable for the baggage of passengers, unless a distinct price had been paid. It was placed on the ground that the carrier is liable only in respect to his reward, and that the compensation should be in proportion to his risk. But now, by common usage, sanctioned by the Courts, a reasonable amount of baggage is deemed to be included in the fare of the passenger. The Courts, however, will not allow this custom to be abused, and, under pretence of baggage, permit articles to be included not within the scope of the term or intent of the parties. They will not permit the carrier to be defrauded of his just compensation, nor subjected to unknown hazards. Hence, when a trunk, containing valuable merchandise, and nothing else, was taken on board a steamboat, and deposited with the ordinary baggage, and lost, it was held that the carrier was not liable.[1]

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[1] Pardee v. Drew, 25 Wend. R. 459; Orange County Bank v. Brown, 9 Wend. 85; Gibbon v. Paynter, 4 Burr. 2298; Bennett v. Dutton, 10 N. H. 481, 486; Blanchard v. Isaacs, 3 Barbour's S. Ct. 388; Batson v. Donavan, 4 Barn. & Ald. 321; Brooke v. Pickwick, 4 Bing. 218; Peixotte v. M'Laughlin, 1 Strobhart, 468; 1 Smith's Leading Cases, 269. In the former of these cases, Nelson, J., in delivering the opinion of the Court, did not put it upon the ground that the passenger intended to impose upon the carrier, and, under the cover of baggage, obtain the transportation of merchandise, free of expense: this, he said, was not material. "It is sufficient," he observed, "that such is the practical effect of his conduct. Neither the captain, nor any of the hands on board the boat, could have suspected that it was a box of costly merchandise, requiring extraordinary attention and care. They could regard it only as the ordinary baggage-trunk of the traveller, containing the usual personal conveniences belonging to him in that character, falling within the customary fare, and to

454. So, too, the carrier would be exempt when the baggage consists of an ordinary travelling-trunk, in which there is a large sum of money. Such money is not considered as included under the term "baggage."[1] Money, however, taken *bona fide* for travelling expenses and personal use, may properly be regarded as forming a part of a traveller's baggage. The passenger is not bound to give notice of the contents of his trunk, unless particular inquiry be made by the carrier. But it must be fully understood that money cannot be considered as baggage, except such as is *bona fide* taken for travelling expenses and personal use; and to such reasonable amount only as a prudent man would deem necessary and proper for such purpose. But money intended for trade or business, or investment, or for transportation, or any other purpose than as above stated, cannot be regarded as baggage.[2]

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be stowed away in the place where such articles are usually deposited. The carrier is thus doubly wronged:—1, deprived of his just reward for carrying the goods, and, 2, prevented from exercising proper precaution against the dangers to which the property may be exposed."

[1] Orange County Bank v. Brown, 9 Wend. 85.

[2] Jordan v. The Fall River Railroad Company, 5 Cushing, 69. This was an action against the railroad company, who were common carriers of freight and passengers from Boston to Fall River. The plaintiff purchased two tickets, from Boston to South Braintree, and from South Braintree to Bridgewater. Her trunk contained articles of clothing, a bracelet, and three hundred and twenty-five dollars in gold. The trunk was delivered, at the station in Boston, to a person who had been in the habit of receiving the baggage of passengers. It was therefore held that a delivery to him was a delivery to the Company. They were bound to keep an agent at the station in Boston, to receive baggage; and if the train was not

455. In the recent English case of The Great Northern Railway Company v. Shepherd,[1] it was held, that if a passenger on a railway, by a third-class parliamentary train, carry merchandise packed up with his personal luggage, the railway com-

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at the station, and the baggage was delivered to the baggage-master, or person acting in that capacity, then the Company was liable for it. Fletcher, J., in delivering the opinion of the Court, said that the time had been, in this country, when the character and credit of our local currency were such, that it was expedient and needful for persons travelling through different States to provide themselves with an amount of specie which could not be conveniently carried about the person, to defray travelling expenses. "But even if bills are taken for this purpose, it may be convenient and suitable that they should be, to some amount, placed in a travelling-trunk, with other necessary articles for personal use. This would seem but a reasonable accommodation to the traveller. It has been objected that the carrier will not expect that there will be money with the baggage, and will not, therefore, be put upon his guard. But, surely, a carrier may very naturally understand and expect that a passenger will place his money for expenses, or some part of it, in his trunk, instead of carrying it all about his person; he certainly might as naturally expect this, as that there would be jewels, or a watch, in a travelling-trunk, for which articles a carrier has been held responsible. . . . . But in the present case, if the money in the trunk could not be considered as a part of the plaintiff's baggage, according to the rule now stated, so that the defendants would be actually responsible for it as common carriers, yet, as the trunk was in the custody of the defendants, they would, upon common and familiar principles, be answerable for gross negligence, wholly irrespective of their liability as common carriers. This principle is well settled in the case of Brooke v. Pickwick, 4 Bing. 218; Batson v. Donovan, 4 B. & Ald. 21." See, also, M'Gill v. Rowand, 3 Barr, 451; Jones v. Voorhees, 10 Ohio, 145, 150; Hawkins v. Hoffman, 6 Hill's R. 586; Orange County Bank v. Brown, 9 Wend. 85; Weed v. Saratoga & S. R. R. Co., 19 Wend. 534.

[1] 9 Eng. Law and Eq. 477.

pany are not responsible for the value of the merchandise, if the luggage be lost from the train. But if the merchandise be so packed as to be obviously merchandise to the eye, and the railway company make no charge or special bargain for the carriage, they will be responsible for the loss. By Act of Parliament, each third-class passenger is allowed 56 lbs. luggage.[1] It was held that this permits a husband and wife, travelling together, to take 112 lbs. weight of luggage between them.

456. The proprietors of public conveyances are not responsible for injuries to the persons of passengers, unless such injuries arose from their negligence. If they have done all that human foresight and care can do to insure the safety of the passengers, they are not liable to respond in damages.[2] The same rule, however, does not apply to the baggage of passengers. It is clear, upon the authorities, that, in the case of baggage, the carrier is held responsible for all losses, except such as arise from inevitable accident, or the enemies of the country. Hence, a company, using steamboats and railroads for the transportation of passengers and their baggage, are liable, as common carriers, for damages happening to the baggage of passengers from a defect in the vehicles or machinery used, although the company is not chargeable with actual negligence, or want of skill, or want of care, in

[1] 7 and 8 Vict., c. 85, s. 6.

[2] The Camden & Amboy R. & T. Co. v. Burke, 13 Wend. 611; Story's Bailments, 601; Stokes v. Saltonstall, 13 Peters, 181; ante, sec. 449, and authorities there cited.

securing the safety of the baggage; and this upon the ground already stated, that, when injury happens to it, nothing will excuse the company but inevitable accident, arising from superhuman causes, or the acts of the enemies of the country. Nor will the company be excused, in such a case, under a notice in the usual form, that "All baggage is at the risk of the owners," notwithstanding the notice is brought home to the knowledge of the passengers. Whatever may be the effect of such notice generally,—and that question will be hereafter considered,—it has never been understood to excuse the carrier from accidents arising from the breach of the implied agreement, in every contract of that nature, that the vessel, or coach, or vehicle, whatever it be, is sufficient for the business in which it is employed.[1]

457. A common carrier has two distinct liabilities, the one for losses by accident or mistake, where he is liable as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. He may, however, restrict his liability as insurer, and thus protect himself against misfortune, but public policy, moving upon enlarged and liberal considerations, requires that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty.[2]

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[1] Camden, &c., Co. v. Burke, 13 Wend. 611; Lyon v. Mells, 5 East, 428; Dorr v. N. J. Steam Nav. Co., 4 Sand. S. C. R. 136.

[2] Clay v. Willan, 1 H. Bl. 298; Evans v. Soule, 2 M. & Selw. 1; Smith v. Home, 8 Taunt. R. 146; Bodenham v. Bennett, 4 Price, R. 34; Down v. Fromont, 4 Camp. R. 41; Story's Bailments, s. 549; Dorr v. N. J. Steam Nav. Co., 4 Sandford's S. C.

458. The question now arises, whether the carrier can restrict his liability, as insurer, by a public notice, or whether, to effect that object, there must be an express special contract. By the common law, the carrier may, by express contract, restrict his liability.[1] Many of the modern English cases went still further, and held that he might restrict his common law liability by a public notice, where the notice was brought home to the bailor, and his assent could be presumed.[2]

459. This extension of the doctrine, however, did not meet with universal favor, and the Courts, at one period, evinced, and wisely evinced, a disposition to hold that common carriers could not, by their notices, shake off the responsibility fastened upon them by the common law. There is, however, it is believed, no case in which the right of a carrier thus to limit his responsibility, was ever by express decision denied. The doctrine produced much mischief. So many questions sprung up, as to what should be the character of the notice, and what should be sufficient evidence that the notice came to the knowledge of the bailor, &c., that Parliament at length interposed

R. 136; N. Y. Steam Nav. Co. v. Merchants' Bank, 6 How. R. 344; Austin v. The Manchester, &c., Railway Co., 16 Jurist, 763. See article upon the Law of Carriers in the American Law Register, vol. i. 65.

[1] Aleyn, 93; 4 Co. 84; Note to Southcote's Case, 4 Burr. 2301, per Yates, J.; 1 Vent. 190, 238; Peake's N. P. Cas. 150; 2 Taunt. 271; 1 Starkie's R. 186.

[2] Nicholson v. Willan, 5 East, 507; Keer v. Same, 2 Ibid. 53; Harris v. Packwood, 3 Taunt. 271; Batson v. Donovan, 4 B. & Ald. 21.

to relieve the public from the doubt and uncertainty that hung over this branch of the law. By the Carriers' Act of 11 Geo. 4, and 1 Will. 4, ch. 68, passed July 23, 1830, limitations by public notice were prohibited, whilst by the 6th section of the Act, special contracts or agreements remained upon the same footing they occupied before its passage. This Act restored, in effect, the ancient and salutary rule of the common law.

460. Such is the state of English law upon this subject, and our American law occupies the same ground. It is reasonable, it is just, and in conformity with sound policy, to permit the carrier by express special contract, to restrict his liability as insurer, and protect himself against misfortune, where the loss does not occur from his own default or neglect of duty. "The necessity of allowing common carriers upon the seas to make special contracts with the owners of property committed to their care, was early seen and recognised, and exceptions in bills of lading, restricting the carriers' liability, have from time to time been added. The same necessity exists as to the domestic commerce in this vast country of ours, where the internal trade is so extensive, reaching as it does, over the greater part of a continent, traversing rivers in length equal to the distance across the Atlantic, stretching out over large inland seas, where the amount of property annually carried has swollen up to hundreds upon hundreds of millions of dollars,—where there exist extensive lines of transportation, reaching through different States, and controlled in

different parts by the several owners, and where insurance companies are organized for the protection of the owners of the property thus transported."[1]

[1] 4 Sandford's Sup. C. R. 136; Campbell, J., overruling Gould v. Hill, 2 Hill's R. 623; N. J. St. Nav. Co. v. Merchants' Bank, 6 How. (U. S. R.) 344; Wills v. The St. Nav. Co., 2 Comstock, 204; Gordon v. Walker, 8 Serg. & Raw. 533. This latter case was a suit against the defendant as a common carrier, there being an exception in the bill of lading of the dangers of the river, &c. Tilghman, C. J. said, "If the case had rested solely on the written contract, there would have been much to say in favor of the decision of the Court, because, be the common law what it may, the parties have a right to alter or modify it by special contract, and when they have done so, the question is, What is the construction of the contract?" See the following recent English cases: Austin v. The Manchester, &c., Railway Co., 21 Law J. (C. P.) R. 179, S. C. 16 Jurist, 763; Chippendale v. The Lancashire, &c., Co., 21 Law J. R. (2 B.) 347; Shaw v. The York, &c., Co., 20 Id. 440; Austin v. The Manchester, &c., Co., 18 Ibid. 181; Carr v. The Lancashire, &c., Co., 21 Law J. R. 261. In the case of Chippendale v. The Lancashire Railway Co. (21 Law J. R. 21), it was held that the following ticket, given by the Company, and signed by the bailor or his agent, formed a special contract between the parties, and exempted the Company from all risk whatever of damage to the animals during the journey: "N. B. This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the Company will not be responsible for any injury or damage, howsoever caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway Company, or in their vehicles." Notwithstanding, the truck in which the animals were conveyed was found by the jury to be so defectively constructed, as to be unfit and unsafe for the purpose of conveying cattle along the line, the Court held, that by the terms of the ticket it was to be understood that the owner of the cattle took upon himself all risk whatever of damage to them during the journey, and, consequently, that the Company were fully protected. The Court, however, studiously confined their opinion to the particular case, and laid down no general rule. "]

461. The doctrine that the carrier may restrict his liability by express special contract, has its basis in the common law. It is the American doctrine. It is productive of no evil consequences. It throws over the subject neither doubt nor uncertainty. It impairs no right. But the extension of the doctrine to public notices, finds no foundation in the common law, is supported by no sound reason, and is productive of manifest mischief. The law, from motives of policy, throws upon the carrier grave responsibilities. Shall he rid himself of these responsibilities by publicly declaring that he will not be responsible? And shall the assent of the bailor to that declaration be implied from the simple circumstance that knowledge of it is brought home to him? The argument is, that when a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such circumstances au-

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take it," said Earle, J., "that the carriage was fit for the journey, and fit for the weight, and that the damage has entirely arisen from the freight being living animals, who made an effort to escape, and so injured themselves. That seems to me to be a risk for which the Company peculiarly said that they would not be responsible. I think that a limitation, however wide in its terms, being in respect of live stock, is reasonable." The doctrine stated in the text is not recognised in Pennsylvania. General notices limit the responsibility of the carrier. See Camden & Amboy R. Co., v. Baldauf, 16 Penn. State R. 67; Angell on Carriers, 525–610.

thorizes an implication of any kind, the presumption is as strong, to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier.[1]

462. The carrier is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the Court in the case of Hollister v. Nowlen, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not

[1] Hollister v. Nowlen, 19 Wend. 234; N. J. St. Nav. Co. v. Mer. Bank, 6 How. 344; Dorr v. N. J. St. Nav. Co., 4 Sand. S. C. R. 136; Hale v. The Same, 15 Conn. 539. By entering into a special contract, the owner of the goods virtually agrees that the carrier, as to the particular transaction, is not to be regarded as in the exercise of his public employment. He stands in the position of an ordinary bailee for hire.

depend upon implication or inference, founded on doubtful and conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.[1]

463. Common carriers are bound to deliver to each passenger, at the end of his journey, his trunk or baggage. The whole duty in this respect rests upon the carrier. The exercise of ordinary care in marking the baggage, entering it upon a way-bill, and delivering a check-ticket to the owner, renders easy its discharge. The passenger is not required to expose his person in a crowd, or endanger his safety in the attempt to designate or claim his property. If, however, the delivery should be conformable to a well-established and notorious usage, known to the passenger, the carrier would probably be discharged. He is bound to make the delivery, but the particular mode in which this shall be done may well be determined by the usage.[2]

464. The same rules are applied to passage-money, as are established on the subject of freight. Hence, if it is paid in advance, and the passenger is not carried to the place of destination, by reason of any event not imputable to him, the passage-money is to be repaid, unless there is a special agreement to the contrary. This is the admitted doctrine of the

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[1] N. J. St. Nav. Co. v. Mer. Bank, 6 How. 344, 382; Nelson, J., 1 Smith's Leading Cases, 279.

[2] Cole v. Goodwin, 19 Wend. 251; Brown v. Ralston, 9 Leigh; Valin on the French Ord., tom. 1, p. 530; 2 Esp. 693; Abbott on Shipp. 463.

maritime law, and is in conformity with the established principles of the common law.[1]

465. Strictly, passage-money is not due before the passenger arrives at the port of destination. The period of payment, however, may be controlled by contract, or established by usage. In point of fact, a distinction is usually made between freight and passage-money, the latter being pre-paid, and the former not until the termination of the voyage. If no contract is made, the usage must control the rights and duties of the parties.

466. In the recent case of Cope v. Dodd,[2] the passenger paid in advance the price of his passage, from Philadelphia to Liverpool. The captain gave him a receipt for the same, which expressed the money to have been paid for his cabin passage in the ship Thomas P. Cope, "to sail to-day for Liverpool." This was held to be a contract to carry the passenger to the destined port. And as the ship was lost on the voyage, he was entitled to recover back the amount paid for his passage. The ship-owners endeavored to show that there was an established custom by which, under circumstances like those in the present case, the passage-money was not to be refunded. The Court held, that such custom could not be proved by single isolated instances. A usage which is to govern a question of right, should be so

[1] Howland v. The Brig Lavinia, 1 Peters' Ad. R. 126; Griggs v. Austin, 3 Pick. 20; Watson v. Day Binck, 3 Johns. R. 335; Cope v. Dodd, 1 Harris, 33; Lemon v. Gordon, 8 Carr & Pay. 392; Barker v. Hodgson, 3 M. & S. 267; Molloy, 250, 260.

[2] *Supra.*

certain, uniform, and notorious, as probably to be known to and understood by the parties, as entering into their contract.[1]

467. The master of a ship has, of course, no lien on the passenger himself, or the clothes which he is actually wearing, when he is about to leave the vessel. But he has a lien on any other property he may have on board. There is no reason why there should not be the same lien for the recovery of passage-money, as for the recovery of freight. The lien attaches to the luggage of the passenger, and the master may detain it until the passage-money is paid.[2]

468. The general rights of passengers, in ships upon the high seas, whether those rights are defined by special contract, or are derived from the law, may be successfully asserted by the judicial tribunals. But it has been found necessary, both in England and this country, in order to repress the cupidity and recklessness of ship-owners, to invoke the aid of special legislation. We propose to close this chapter by a concise statement of the several Acts of Congress upon this subject. It must be understood, however, that the passenger laws of the United States apply only to passengers whilst on their voyage, and until they shall have landed. After the landing of passengers, the laws of the United

[1] Cope v. Dodd, 1 Harris, 33; U. S. v. Duval, Gilp. 356; Dean v. Swoop, 2 Bin. 72.

[2] Wolf v. Summers, 2 Camp. N. P. R. 631; Abbott on Shipp., p. 288.

States do not come in conflict with the laws of a State, which oblige security to be given against their becoming chargeable as paupers; and for their removal out of the State, in the event of their having become so chargeable.[1] But any State law, which imposes a tax or duty on passengers, arriving at the ports of such State, is in conflict with the powers of Congress, and repugnant to the Constitution of the United States.[2]

469. By a recent Act,[3] it is provided, that if the master of any vessel, owned in whole or in part by a citizen of the United States of America, or by a citizen of any foreign country, takes on board such vessel, at any foreign port or place, a greater number of passengers than in the following proportion to the space occupied by them, and appropriated for their use, and unoccupied by stores, and other goods, not being the personal luggage of such passengers, that is to say, on the lower deck or platform one passenger for every fourteen clear superficial feet of deck, and on the orlop deck (if any) one passenger for every thirty such superficial feet, in all cases, with intent to bring such passengers to the United States of America, and shall leave such port or place with the same, and bring the same, or any number thereof, within the jurisdiction of the United States aforesaid, or if any such master of vessel shall take on

[1] City of New York v. Miln, 11 Peters' R. 102.

[2] Passenger Cases, 7 How. R. 402, 470, 557.

[3] Act of 22d Feb., 1847, chap. 16, s. 1. See the cases of The Creole and The Achsah, an abstract of which is given in 2 Whart. Dig. 655.

board his vessel, at any port or place within the jurisdiction of the United States aforesaid, any greater number of passengers than the proportions aforesaid admit, with intent to carry the same to any foreign port or place, every such master shall be deemed guilty of a misdemeanor, and upon conviction thereof before any Circuit or District Court of the United States, shall, for each passenger taken on board beyond the above proportions, be fined in the sum of fifty dollars, and may also be imprisoned for any term not exceeding one year.

470. This section, that is, the first section of the Act of 1847, was amended by the Act of March 17, 1848,[1] so that, when the height or distance between the decks of the vessel referred to in the said section shall be less than six feet and not less than five feet, there shall be allowed to each passenger sixteen clear superficial feet on the deck: and if the master of any such vessel shall take on board his vessel, in any port of the United States, a greater number of passengers than is allowed by this section, that is, the eighth section of the Act of 1848, with the intent specified in the first section of the Act of 1847, or if the master of any such vessel shall take on board at a foreign port, and bring within the jurisdiction of the United States, a greater number of passengers than is allowed by this section (the 8th of the Act of 1848), such master shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished in the manner provided for the punishment of persons convicted of a violation of the

[1] Chap. 41, sec. 8.

Act of '47; and in computing the number of passengers on board such vessel, all children, under the age of one year, at the time of embarkation, are excluded from the computation. By the 10th section of this Act, so much of the first section of the Act of March 2, 1819,[1] or any other Act that limits the number of passengers to two for every five tons, is repealed.

471. It is also provided, that if any vessel owned as aforesaid, has more than two tiers of berths, or if the interval between the floor and the deck or platform beneath is not at least six inches, and if the berths are not well constructed, or if the dimensions of such berths are not at least six feet in length, and at least eighteen inches in width, for each passenger, the master of such vessel shall forfeit and pay the sum of five dollars for each and every passenger on board of the vessel on such voyage, to be recovered by the United States in any Circuit or District Court of the United States, where such vessel may arrive, and from which she sails.[2] For all the purposes of the Act of 1847,[3] two children, each being under the age of eight years, are deemed equal to one passenger. Children under the age of one year are excluded, as before observed, in computing the number of passengers. It should be here observed, that the penalties denounced by the Act of 1847, are declared to be liens on the vessel or vessels incurring them, and they may be libelled and sold, upon their arrival within the jurisdiction of a District Court of the United States.[4]

[1] Ch. 46.
[2] Act of Feb. 22, 1847, sec. 3.
[3] Ibid.
[4] Sec. 5.

472. The Act of 1848[1] has imposed many and new regulations upon the masters of passenger-vessels, having for their object the comfort and security of the passengers. We do not propose to detail with particularity all the provisions of this Act. We shall only refer to them in a brief and cursory manner. The first section requires that all vessels, whether of the United States or any other country, having sufficient capacity according to law for fifty or more passengers (other than cabin passengers) shall, when employed in transporting such passengers between the United States and Europe, have on the upper deck, for the use of such passengers, a house over the passage-way leading to the apartment allotted to such passengers below deck, constructed and secured in the manner therein described. All vessels so employed, and having the capacity to carry one hundred and fifty or more passengers, are required to have two such houses. It is provided, however, that vessels having three permanent decks, may substitute booby hatches for such houses.

473. Provision is also made for ventilators,[2] for cooking-ranges on deck, for victualling passenger-vessels, &c., with adequate penalties annexed. The vast multitudes that annually leave the shores of Europe for the United States, crowding, as they do, the decks of every vessel, will at once suggest the wisdom and humanity of the various Acts of Congress that have been passed to secure and promote their health and comfort.

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[1] March 17, chap. 41. [2] Vide Sec. 2.

# CHAPTER V.

## OF THE CONVEYANCE OF GOODS IN A GENERAL SHIP.

474. A TRADING-SHIP is employed by virtue of two distinct species of contract. First, the contract by which an entire ship, or, at least, the principal part thereof, is let for a determined voyage to one or more places. This is usually done by a written instrument, signed and sealed, and called a charter-party. Secondly, the contract by which the master or owners of a ship, destined on a particular voyage, engage separately with a number of persons, unconnected with each other, to convey their respective goods to the place of the ship's destination. A ship employed in this manner is usually called a general ship.[1] The nature of this latter contract, and the rights and duties growing out of it, will form the subject of discussion in this chapter.

475. It should be observed that the owners are bound by every lawful contract made by the master relative to the usual employment of the ship. The law gives the shipper of goods a twofold remedy: 1, against the owners, and, 2, against the master

[1] Abbott on Shipp., p. 156.

personally. The ship, too, is specifically bound, in accordance with the ancient and wise policy of the general maritime law:—"*Le batel est obligé à la marchandise, et la marchandise au batel.*"[1]

476. In the contract which we are now considering,—that is, the contract for conveyance in a general ship,—the bill of lading is commonly the evidence of the contract. The cargo being put on board, the master executes two or more bills of lading. The shipper receives one of these for his own use, another goes to the consignee or correspondent, and the master retains the third, which is, in general, legal evidence of the specific quantity of merchandise shipped.[2]

477. It is not essential to the validity of the contract that the bill of lading should have been signed by the master himself. It is equally binding upon all parties, if signed by his authorized agent. And if the authority of the agent does not appear upon the bill of lading, he may be called as a witness to prove such authority.[3] It must be

[1] "The ship is bound to the merchandise, and the merchandise to the ship." Cleiarc, Us. et Coustumes de la Mer, p. 72.

[2] Woolrych's Com. Law, 59.

[3] Putnam v. Tillotson, 13 Metcalf, 517. It was held in this case, that where goods are ordered to be sent to a distant purchaser, a delivery to a carrier appointed by the consignee vests the property in the purchaser. Vide, as to the same point, Stanton v. Eager, 16 Pick. 467. So, a delivery to a common carrier, in the usual course of business, when no carrier is named by the purchaser, is a good constructive delivery to vest the property in the vendee. Also, such carrier, who has executed a bill of lading,

understood that the simple fact of a person being the master of a vessel does not, *per se*, clothe him with the authority to bind the owner by signing a bill of lading for goods received on freight. But this authority he must have, to make the contract binding on the owners. He may have it, however, either by express delegation, or it may be implied from the usual employment of the vessel. The master of a vessel employed in the freighting business, who is in the habit of receiving goods for hire and signing bills of lading, has authority to bind the owner as much as if the authority were expressly given.[1]

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by himself or his authorized agent, becomes thereupon answerable to the consignee; and, in case of non-delivery, the action may be brought by the consignee. As to the first point, see Dutton v. Solomonson, 3 Bos. & Pul. 582, and, as to the last, Dawes v. Peck, 8 T. R. 330.

[1] Nichols v. De Wolf, 1 N. J. Rep. 277. "The owner," said Greene, J., in giving the opinion of the Court in this case, "cannot reap the benefit of the captain's contracts without likewise being liable for the losses, if the contracts are made within the scope of the captain's agency. But there are various kinds of voyages. A man may send his vessel to procure a cargo on his own account, and in such cases the master has no power to take freight; or he may send his vessel to get freight, and then the very business is to procure goods on freight, and sign bills of lading, and the signature binds the owner. The vessel may be employed in both ways. She may be sent to procure goods on account of the owner, and, if she be not fully laden on owner's account, to fill up with goods upon freight. By such incidental contracts for freight the owner is bound. Did the defendant's vessel sustain this twofold character? . . . . . The question in this case is, whether such an authority can be inferred from the usual employment of the vessel. If the captain was in the habit of taking goods on freight, and of signing bills of lading, and the

478. It is incidental to the general authority of the master to make all contracts relative to the usual employment of the ship. He is the general agent of the owner for this purpose. All parties concerned have a right to assume that the agent has authority to do all that is necessary, within the scope of his employment. But the master of a ship has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel. It follows, therefore, that the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board.[1] But if, through inadvertence, or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf, ready to be shipped, or in the ship-owner's warehouse, or in the shipper's own warehouse, at hand and ready, and afterwards they are placed on board, as and for the goods embraced in the bill of lading, as against the shipper and

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defendant knew this, the defendant ought not to be allowed to deny the captain's authority. And this authority cannot be inferred from one, or two, or three instances of such dealing; but a sufficient number must be shown to prove that, in the sense of the law, this was the usual employment of the vessel. If the captain, upon his own risk, was in the habit of taking small packages or boxes without giving bills of lading, the owner is not bound. This is not unfrequently done by stage-drivers and captains of steamboats, who take small packages, and receive the freight or compensation for carrying, without any liability on the part of the steamboat or stage company."

[1] Grant v. Norway, 2 Eng. Law and Eq. R. 337; Lickbarrow v. Mason, 2 T. R. 77. See also Mechanics' and Traders' Bank v. Gordon, 5 Louis. R. 604.

master, the bill of lading will operate on these goods by way of relation and estoppel.[1]

479. It is a general principle, familiar to all, that a written contract cannot be varied by parol evidence of instructions given before or at the time the contract is executed, because all the terms of the agreement are deemed to be expressed and fixed by the written instrument. This principle, in its application to a bill of lading, is somewhat modified, and because of the peculiar character of that instrument. Ordinarily, a bill of lading partakes of a twofold character. It is both a receipt and a contract. It is a receipt as to the number of bushels, or the quantity of the article put on board the vessel; and it is a contract to deliver the same at a certain place, and to a certain party. As far as it is a receipt, it is, without doubt, open to explanation between the parties to it. The person giving it may prove that he was mistaken in the quantity of goods delivered to him. But there is no case which goes the length of holding that the master shall be permitted to allege, not only that he did not receive the quantity of goods specified, but also that there was a mistake in the bill of lading, in stating the destination of the property intrusted to him. If the bill

[1] Rowley v. Bigelow, 12 Pick. R. 307. When a party who has advanced money upon a bill of lading, which he afterwards has reason to believe is a forgery, permits the supposed forger to raise means from a third person to reimburse the advances made, and the bill of lading proves to be a forgery, it will be regarded as a fraud upon the third person, by which the party who made the advance will not be allowed to benefit himself. Chamberlin v. Milbank, 6 Louis. R. 383.

of lading state that the property was to go to Liverpool, the master cannot prove that by verbal agreement it was to be sent to London. That would be a distinct variation of the contract, of which parol evidence cannot be admitted. The true distinction is the one we have already mentioned, namely, as a receipt, the bill of lading may be varied and explained by parol; as a contract, it cannot.[1]

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[1] Wolfe v. Myers, 3 Sand. (N. Y.) Sup. Ct. R. 7; Bond v. Frost, 6 Louis. R. 801; The Ninetta, Crabbe's R. 534; Bates v. Todd, 1 Moo. & Rob. 106; Berkley v. Watling, 7 Ad. & El. 29; Howard v. Tucker, 1 B. & Ad. 712; Pickard v. Sears, 6 Ad. & E. 474. In the case of Portland Bank v. Stubbs, 6 Mass. 422, one of the points was, whether the plaintiffs could be admitted to contradict the bill of lading in that case, by proving that no freight had been paid for the salt. "If Stubbs, the consignee," said Chief Justice Parsons, "was a stranger to the shipment, and no party to the bill of lading in making it, it is very clear that, as to him, the bill of lading cannot be contradicted by proving that no freight had been paid. As he is one of the shippers, if the acknowledgment by the master of the payment of freight had been obtained by fraud or mistake, we are satisfied that evidence of such fraud or mistake might be admitted," &c. The same Court, in the more recent case of Low v. De Wolf, 8 Pick. R. 101, 107, held the following language: "These bills of lading, though *primâ facie* evidence of absolute property in him to whom they are endorsed *bona fide*, and for a valuable consideration, are nevertheless capable of being explained; as in the case of Hibbert v. Carter, 1 T. R. 745, where it was held, that though the endorsement and delivery of a bill of lading to a creditor *primâ facie* conveys the whole property in the goods from the time of its delivery, yet, if the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, the property of the goods is, for the purpose of insurance, considered to remain in the endorser." The Supreme Court of Pennsylvania, in the case of Warden v. Greer, 6 Watts' R. 424, held, that in an action against a common carrier by a consignee for not

480. When a party who claims the right to goods on board a vessel, for which bills of lading have been signed, demands the bills of lading, it is a sufficient demand of the goods, which they represent. The bills of lading are the evidences of title to the property; and a demand of those evidences is a demand of the goods represented by them. And such demand binds the charterer as well as the owner of the vessel. The charterer cannot withhold goods for which the master has signed bills of lading to third parties, against *bona fide* assignees of such bills for value, on the ground that the property was his own, and the bills should have been signed by him. By issuing the bills of lading, in the usual course of his employment, to a party and his assignees, the

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delivering goods in good order, the defendant will not be permitted to give evidence to contradict the bill of lading signed by him, unless it be to prove that a fraud or imposition was practised upon him. "Some difficulty arose," says the Court, "as to whether the owners could contradict the bill of lading. This is not generally permitted; but cases may occur in which it may be proved there was imposition on the captain, or a mistake of both consignor and captain. The captain does not open or otherwise examine the casks. Suppose he receives a barrel of corn, instead of a barrel of coffee; or a barrel of cider, instead of Madeira wine; or a package of cotton linen, instead of flaxen linen: it would seem his bill of lading would not and ought not to exclude him from proving this, whether it arose from mistake or fraud in the consignor. But it would unsettle everything to permit a captain to receipt a bill for one hundred barrels of molasses, and, at fifteen hundred miles' distance, prove by his hands that the barrels were not half-full, or to receipt for them as in good order, and prove that they were in so bad order as to leak a gallon or a quart an hour." The bill of lading is a mere receipt for the goods, and contains no stipulation or liability to which the master would not be subject by the general maritime law. The Ninetta, *ubi supra*.

master enables such party to dispose of the property to others in good faith for value, by a mere endorsement of the bills. And this enables the holder of the bills to demand the goods from the master of the ship, whoever he may be, and he can hold them by virtue of the bills of lading against any direction or control of the charterer.[1]

481. When the master signs a bill of lading, which contains a stipulation, giving him "the privilege of reshipping on any good boat," neither he nor his owners are discharged from the obligation of carriage and delivery to the port of destination, by merely reshipping the goods on board "any good boat." The master having undertaken, for a stipulated reward, to deliver the goods in good order at the port of destination, is bound to do so, unless he shows that the goods were lost, or so injured as to prevent their delivery, by the unavoidable accidents of navigation. The *onus* lies on him, whether he reships the goods or not.[2] When the privilege of reshipping is re-

[1] Zachrisson v. Ahman, 2 Sandf. S. C. R. 68. See also, The Brig Lowndes, 5 Louis. R. 426.

[2] Dunseth v. Wade, 2 Scammon's R. 289. See Wilcox v. Parmelee, 3 Sandf. S. C. R. 610. In Walker v. Cassaway, 4 Louis. R. 19, it was held, that where the master of a steamer, by false representations, induces an agent of a third person to ship merchandise on his boat at a certain freight, and the bill of lading states that the merchandise is taken "with the privilege of reshipping," and the freight is reshipped on another boat and brought to the port of destination, the owner of the merchandise cannot require its delivery before paying the freight due to the boat on which it was so reshipped, the contract by the master of the second boat having been made in good faith, at a reasonable rate, with a party who held a possession apparently fair, under a bill of lading

served, it is incumbent on the master of the boat, in order to discharge himself from his obligations, in case of loss, to show by legal evidence, not only that the goods were reshipped on a good boat, but that the goods were lost by the unavoidable accidents of the river.[1]

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authorizing a reshipment. The bad faith of the master of the first boat should not deprive the owners of the second boat of the remuneration due for their labor. It was also held, that when a bill of lading stipulates for the privilege of reshipment, a second carrier to whom the merchandise is transferred will have a lien on the property for his freight. He is not the mere agent of the first carrier.

[1] Dunseth v. Wade, *supra*. See also, 6 & 7 Ohio R., and Whitesides v. Russell, 8 W. & S. 44. In this latter case, Judge Rogers, in delivering the opinion of the Court, said, "The privilege of reshipment reserved in the bill of lading, is intended for the benefit of the carrier, but was not designed to limit his responsibility; he continues liable, notwithstanding this clause, by the express terms of the contract, to deliver the goods safe and in good order at Pittsburg; but he is at liberty to do this either in his own boat or in any other good boat which the carrier may select. This point has been ruled the same way in two of our sister States, Ohio and Illinois (6 & 7 Ohio R. 143; M'Gregor v. Kilgore, 2 Scammond, 288). A stipulation in a bill of lading that the shipper, in case of low water, may reship in other craft, does not vary his obligation to deliver safely. Such stipulation is for his benefit, and continues his liability if resorted to. It was but a privilege, say the Court, to the carrier, on the executing of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a portion of the freight as he could earn, and to throw upon the owner any increase of expense. The relation of carrier continues from the shipment of the goods until the arrival at the destined point of delivery." Whitesides v. Russell, was an action to recover the value of twelve tierces of rice, shipped at New Orleans on board the steamer Norfolk, then lying at New Orleans, bound for Pittsburg. The defendants agreed to deliver the goods in good order at the port of Pittsburg (the dangers of the navigation excepted), reserving the privilege of reshipping the same

482. It is proper to observe in this place, that steamboats, like other vessels, may be employed as common carriers, and when so employed, their owners are liable for all losses and damages to goods and other property intrusted to them as common carriers, to the same extent and in the same manner as any other common carriers by sea. But whether they are so, depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties, and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations, and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any

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in good boats. The rice was reshipped at Cincinnati on board the steamer Levi Welsh, which it is agreed was a good boat. At Blennerhassett's Island the Levi Welsh struck upon a stone in the Ohio river, and knocked a hole in her bottom, by which the rice was damaged and lost. The carrier claimed that this was a loss from a peril of the navigation, and that he was therefore exempt from liability. The Court said, that it was incumbent on him to prove the loss and manner of it, and also that the usual care and diligence had been used to avoid it. See to the same point, 1 Con. Rep. 189; 11 Wend. 25; 5 Rawle. 189; 6 W. & S. 408.

other goods or property intrusted to their agents without their consent. Our steamboats are ordinarily employed in the carriage not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But whether steamboat owners are common carriers or not, depends on the usage of different routes and different ports, and that usage must be established as a matter of fact by suitable proofs. In the absence of proof, the Courts will not undertake to say judicially, that they are, *per se*, common carriers.[1]

[1] The Nantucket Steamboat Co., 2 Story's C. C. R. 16, 33; Story, J. See also Gilmore v. Carman, 1 Smedes & Marshall, 279. In this latter case, Chief Justice Sharkey said, "There could be no doubt but what the owners of steamboats engaged in the carrying trade on the navigable rivers, are to be regarded as common carriers. It is their business or calling," he observed, "to transport merchandise and other articles from one port to another for a price or compensation. Being common carriers, they are liable for all losses except those which have occurred by inevitable accident resulting from the act of God, or those which may have resulted from public enemies of the country. The owners are the insurers against all losses occasioned by accidents not within the exceptions of law, or which are not excepted by special contract. Loss by fire, is not a loss by an inevitable accident, which will protect the owners under the law. Nor are they exonerated by the exception in the bill of lading, 'the dangers of the river only excepted.' This exception is not sufficiently broad to cover any casualty which is not peculiar to the navigation of the river. And the danger of fire does not fall within the exception. It is not a danger which proceeds from or is peculiar to the river. It arises from the means used in propelling the boat, and not from any obstacle or impediment in the river. The boat itself is the depository of the agent which produces its own destruction.

483. The usual words in a bill of lading ("*To be delivered, &c., unto order, or assigns*"), binding the master to deliver the goods to the person to whom the shipper or consignor shall order the delivery, or to the assignee of such person, enables, as we have already seen, the person so named, or his assignee, to demand the goods. But where A., being indebted to B., ships goods on his own account and risk, and sends therewith bills of lading, by which the goods are made deliverable to his own order, and which are endorsed by him in blank, and enclosed to C., the successor of B., with authority to fill up the blank and make the goods deliverable to himself, or to such person as he might name, with power to receive the proceeds in satisfaction of A.'s debt to B., and upon the arrival of the ship at the designated port, with the goods on board, C. fills up the endorsement upon the bills of lading, making the goods deliverable to D., who is to pay freight and duties, dispose of the goods, and account for the proceeds in payment of A.'s debt, and D. thereupon receives the goods, enters them at the custom-house, gives bond for the duties, and becomes responsible for the freight—the property does not thereby vest in B. And if the goods, while thus in the possession of D., are attached as the property of B., D. may maintain replevin against the attaching officer.[1]

484. It is a question of considerable difficulty, as

If the owner chooses to employ this agent, he cannot with propriety say that it is productive of a danger incident to the navigation of the river," &c. See further upon this point, Smith's Leading Cases (Am. Ed.).

[1] Chandler v. Sprague, 5 Met. 306.

to who is entitled to bring the action against the owner and master upon the contract, evidenced by a bill of lading, and for losses or injuries occasioned by their misconduct or negligence. According as the right of property or the right of possession is vested in the one or the other, it may be brought in the name of the consignor or consignee. It has been said by high authority, that no rule of general application can be laid down for the solution of this difficulty, but that in all cases it is important to consider in whom the right of property, and sometimes in whom the right of possession, is vested, at the time of the breach of contract or neglect of duty which is complained of.[1]

485. Where the bill of lading expresses the goods to be shipped for the account and risk of the consignee, he paying the freight, in the absence of any proof showing the relation of the consignor and consignee, the former will be regarded as a mere agent of the latter. And any property he might have had in

[1] Abbott on Shipp., p. 403. In the case of The Mary Ann Guest, Blatchf. R. 358, goods were purchased on credit and shipped by the vendor on board of a vessel whose master gave a bill of lading for their delivery to the consignee or his order. Before the vessel reached the port, the bill was endorsed to A., who advanced cash upon it. After she arrived, and before A. demanded the goods, they were replevied by the vendor, on an allegation that the vendee had agreed to pay for the goods on delivery, but had become insolvent, and had not paid for them. *Held*, that A. was a *bonâ fide* purchaser, that the seizure of the goods by virtue of the writ of replevin constituted no bar to his right to the delivery of the goods, and that, on a libel *in rem*, the vessel was responsible to him, irrespective of the suit between the vendor and vendee.

the goods is divested by the delivery to the carrier. And, therefore, no right of action remains to him.[1] If, however, the goods are at the risk of the consignor during their transit, the property remains in him until delivery, and this notwithstanding the freight is to be paid by the consignee.[2]

486. The general principle is, that the person who employs the carrier must bring the action, and the circumstance of the right of property being in one person may be evidence of employment by that person.[3] In the case of vendor and vendee, if the goods are, whilst the carrier has the care of them, to be at the risk of the vendor, he must bring the action against the carrier. In ordinary cases, the vendor employs the carrier as the agent of the vendee.[4]

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[1] Potter v. Lansing, 1 John. R. 215; Dawes v. Peck, 8 D. & E. 330; Evans v. Martlett, 1 Lord Raym. 271; Shee v. Prescott, 1 Atk. 248, 6 East, 23.

[2] Ludlow v. Bowne, 1 John. R. 1.

[3] Freeman v. Birch, 1 Nev. & Mar. 420.

[4] Ibid.; Davis v. James, 5 Burr. 2680; Moon v. Wilson, 1 T. R. 659; Chandler v. Sprague, 5 Metcalf, 306; Griffith v. Ingledew, 6 Serg. & R. 429. In this latter case, the consignor owned the goods, and he had paid the freight for the same, yet the Court held, that the consignee might maintain an action for damage to the goods. The Court put their decision upon the ground that the legal property, by virtue of the bill of lading, was vested in the consignee, although he held in trust for the consignor. Gibson, J., dissented from the opinion of the Court. After a careful examination and analysis of the authorities, he thus stated his conclusion: "The bill of lading constituted an express promise, and the consideration having moved from the consignor, who alone was interested in the performance of the contract, I am of opinion, whether we follow Dutton v. Poole, 1 Vent. 318, or the decisions

487. Where the consignee procures the consignment by fraud, the property of the goods never passes out of the consignor, and he, therefore, is the proper party to bring the action.[1] Generally speaking, when goods of a fair merchantable quality are forwarded in pursuance of a written order, which binds the person giving the order to receive the goods, the property passes to that person by the delivery of the carrier, and he is the proper person to sue the carrier if the goods are lost, but if the goods are sent merely for approval, no property passes until the goods are received and approved. The goods, therefore, during their transit, remain the property of the consignor, and he alone is entitled to sue.[2]

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directly on the point, or those general principles which are applicable to all express contracts, or even treat the promise as having arisen by implication of law, the consignee ought not to maintain his action."

[1] Stephenson v. Hart, 4 Bing. R. 476; Wilson v. Churchman, 4 Louis. R. 452; Duff v. Budd, 3 Brod. & Bing. 177.

[2] Swain v. Shepherd, 1 Mood. & Rob. 223; Fragano v. Long, 4 B. & C. 219. In this case, Fragano, the plaintiff, sent an order to Mason & Sons, at Birmingham (he residing at Naples), for certain goods, "to be despatched on insurance being effected. Terms to be three months' credit from the time of arrival." But for that order the goods never would have left Mason's warehouse, and when sent were marked with Fragano's initials. The risk of the goods was thrown upon Fragano the moment the transit began. At Liverpool, Stokes & Co., Mason's shipping agents, shipped the goods and took a receipt. On the passage, the goods, through the negligence of the master, were damaged. It was held that the action was rightly brought in the name of Fragano, in whom vested the property of the goods the moment they left Mason's warehouse. See also Stanton v. Eager, 16 Pick. 467.

488. If the carrier expressly contracts to be liable to the consignor in consideration of the carriage, in that case the action may be brought in the name of the consignor, not on the ground of any right of property that he may retain in the goods, but on the ground of the agreement.[1]

489. The shipper has the sole authority, in the first instance, to direct the consignment, and if he fills up the bill of lading with the name of a particular consignee or bearer, with a view to some negotiation of his own, which, however, he does not accomplish, and does not deliver the bill of lading, the insertion of such name gives the consignee no authority over or interest in it.[2] If the name is left blank, the property passes by a delivery of the bills of lading by the shipper.[3] And this is sufficient to enable the holder to receive and hold the property against any person except a prior endorsee without notice.[4]

490. Where the shipper of goods draws a bill of exchange upon the credit of the consignment, and, as collateral security, delivers to the holder the bill of lading, by which the goods are to be delivered to the consignee or bearer, and the consignee refuses to ac-

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[1] Moore v. Wilson, 1 T. R. 659, vide Stanton v. Eager, 16 Pick. 46, as to the effect of an order, and goods shipped in pursuance of it.

[2] Allen v. Williams, 12 Pick. 297; Hibbert v. Carter, 2 D. & E. 71; Lickbarrow v. Mason, 5 T. R. 367; Haille v. Smith, 1 B. & P. 563; Buffington v. Curtis, 15 Mass. 528.

[3] Low v. De Wolf, 8 Pick. R. 101.

[4] Nathan v. Giles, 5 Taunt. 558; Allen v. Williams, 12 Pick. 297.

cept the draft, but afterwards obtains the goods from the master of the vessel and sells them, it is held, that upon the refusal to accept the draft, the holder becomes entitled to the possession of the goods, and may maintain an action against the consignee for the proceeds of the sale.[1]

491. In the case of Allen v. Williams, where this point was settled, the question was presented to the Court, whether the consignee did not make himself liable to pay the draft, from having received the consignment, that being the fund from which it was to have been met. It was contended that when a consignee is advised of a provisional consignment, and, at the same time, of a bill of exchange, drawn expressly upon the credit of such consignment, and the bill of lading and the draft are tendered together, if the consignee will accept the consignment at all, he does *ipso facto* accept the draft, and may be charged in an action as acceptor. On the other hand, it was said, that when the drawee not only declines accepting the draft, but in terms refuses to do so, and gets possession of the property shipped, not by means of the bills of lading, held by the holder of the draft, but by some other means, it would be pressing the doctrine of constructive acceptance too far, to charge such consignee as acceptor. The Court declined giving an opinion upon the point, it not being necessary to a decision of the cause, but observed that such a question might well depend upon a careful discrimination of the circumstances of each particular case.

[1] Nathan v. Giles, 5 Taunt. 558; Allen v. Williams, 12 Pick. 297.

492. The general principle deducible from the cases, although they are not in all respects reconcilable, is that actions against ship-owners, as carriers, in their implied contract, and actions for the loss or injury of the goods intrusted to them, must be brought by a person who has some property in the goods. The consignee will be deemed to have such a property, unless the contrary appear. To enable a person to maintain an action of trover for goods, or for not delivering goods to him, he must also have a right of possession. In the case of an express contract, evidenced by a bill of lading, the action may be brought by the shipper with whom the master contracted, or by the owner of the goods, whose agent the shipper was, or, in some cases, by the person to whom, by the terms of the bill of lading, the master undertook to deliver them.[1]

[1] Abbott on Shipp., 414. See, also, the recent case of Grove v. Brien, 8 How. R. 429. For cases where, by the terms of dealing between the consignor and consignee, the property in the goods vested in the latter at the time of shipment, and, therefore, determined the question as to who should bring an action against the ship-owner for the loss or injury of the goods, see Haille v. Smith, 1 B. & P. 563; Cox v. Harden, 4 East, R. 211; Branett v. Bowlby, 2 B. & Ad. 932; Zachrisson v. Akman, 2 Sandf. S. C. R. 68; Walley v. Montgomery, 3 East's R. 585. In this latter case, the consignor advised the consignee, by letter, that he had chartered a certain ship on his account, and inclosed him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order, &c., he paying freight for the said goods according to charter-party; and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo. It was held that the invoice and bill

493. Warehousemen and forwarding-merchants are responsible only for want of good faith, and reasonable or ordinary diligence; but one of the first duties of a consignee for transmission is to obey the instructions of the consignor, either express or fairly implied. When they undertake to vary from the instructions, proceeding from whatever motive it may, and a loss is occasioned thereby, they are clearly liable to the owner of the goods.[1]

494. Hence, when the consignor and owner delivers goods to a forwarding-merchant, directed to "J. F.," and, instead of forwarding them in the manner directed, he inserts, without any authority, the name of a consignee in the bill of lading, which was not marked on the goods, and, in consequence, the goods are seized and sold by a sheriff as the property of the person whose name is thus inserted, the forwarder is liable to the real owner.[2]

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of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods *in transitu*, in case of the insolvency of the other. And the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptance at three months in the manner before stipulated, it was held that the consignee might maintain trover against such agent, without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully. See also Ogle v. Atkinson, 5 Taunt. 759, Mitchel v. Ede, 3 Perry & Dav. 513, as to conditional consignments. Also, Barrow v. Coles, 3 Camp. 92; Wilmshurst v. Bowker, 5 Bing. N. C. 5.

[1] Forsythe v. Walker, 9 Barr, 148, Rogers, J. [2] Ibid.

495. A bill of lading, like other contracts, is to be construed according to the intention of the parties. Usage of trade is always presumed to be within the knowledge of the parties, and the bill of lading is supposed to be made with reference to it. Hence, where the bill of lading expresses that goods are to be carried from one port to another, a direct voyage is *primâ facie* intended; but this presumption may be controlled by a usage to stop at intermediate ports, or by personal knowledge, on the part of the shipper, that such a course is to be pursued.[1]

496. If, after the signing of a bill of lading, war ensues between the country to which the ship belongs and the country to which, with the cargo, she is destined, the contract is dissolved. The bill of lading is of no legal effect after the declaration of war, nor can any action be maintained upon it. In such a case, it is always a sufficient answer that it has become impossible to perform the contract without violating the laws of the country.[2]

497. The voyage performed, it remains for the master to make a delivery of the cargo. "In considering to whom he will be safe in making and in refusing delivery, it may be useful," observes Mr. Abbott, "to remind the master that he can rarely incur any responsibility by adhering strictly to his engagement with the shipper. In case of conflicting claims, it may be prudent to require indemnity; but

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[1] Lowry v. Russel, 8 Pick. 360.

[2] Brown v. Delano, 12 Mass. R. 370.

if he make delivery to the person who first claims the goods under a bill of lading regularly assigned to him, the consignor will seldom have much color to complain that orders drawn up by himself have been too strictly observed."[1]

498. If several tenants in common make a shipment of goods, and consign them to the master, the consignment is to be considered as several, notwithstanding the instructions and bill of lading are to him as in a joint concern. He has no authority, therefore, on the return voyage, to consign the whole exclusively to two of the owners, excluding the others. Being himself the general consignee, he ought, upon the homeward voyage, to make the consignment general to himself for the use of the owners, or to them directly, according to their respective shares. But if, instead of doing this, he makes the consignment to one of the tenants in common, the latter has no lien on it for any separate and distinct demands against the other tenants in common, nor against any firm of which they may be partners with a third person, nor can he set off such debts, in a suit brought against him by the other tenants, or by their assignee, in equity, to account for their share of the property.[2]

499. If goods are put on board a vessel without the knowledge of the master, he may put them

[1] Abb. on Shipp., p. 414, 415.

[2] Jackson v. Robinson, 3 Mason's R. 138. In general, the doctrine of set-off is the same in equity as at law.

ashore, for there is no implied contract of affreightment. If he retains them on board, and carries them on to the port of destination, he is entitled to freight for their carriage, and would be answerable, I presume, as well as the ship-owner, whose agent he is, for the want of care and diligence, with respect to them. For the undertaking to carry them is voluntary, and the law would therefore hold him to the same degree of accountability and responsibility, as if he undertook their carriage by express contract. If, however, the goods are not discovered until the ship sails, the better opinion is that the master is not to leave them at an intermediate port without necessity, but to carry them to the port of destination.

500. But the ship-owner, in such a case, is not responsible for any loss or injury that may happen to them on the voyage, nor is he responsible when the master takes goods on board clandestinely, beyond the scope of his authority. When goods are brought into the ship without the master's knowledge, and are not discovered until after the ship sails, the question arises as to the nature and degree of his responsibility. Being made a bailee without his knowledge and against his will, the law will not, I apprehend, hold him accountable to all the rigid conditions and responsibilities attached to that character when voluntarily assumed. He would be bound to ordinary care and diligence, and answerable for gross negligence or wanton injury. And that upon the most obvious principles of law and

justice should be the measure and limit of his responsibility.[1]

501. The words, "contents unknown," annexed to a bill of lading, imply that the master only meant to acknowledge the shipment in good order of the goods, as to their external condition, or rather as to the external condition of the cases, &c., in which they are put up, excluding any implication as to their quantity or quality, or as to their condition at the time they were received on board, or as to whether properly packed or not in the boxes.[2]

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[1] Bonney v. The Huntress, Davies' R. 82; Walter v. Brewer, 11 Mass. 99; Ord. de la Marine, art. 7; Code de Commerce, No. 292.

[2] Clark v. Barnwell, 12 How. U. S. R. 272; Abbott on Shipp. 416. "If there is any dispute," says Mr. Abbott, "about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly."

## CHAPTER VI.

### OF THE EARNING AND PAYMENT OF FREIGHT.

502. FREIGHT is the hire which is earned by the transportation of goods. This is the original and elementary signification of the word. It is due for the service which is rendered in transporting them from a place where they are supposed to be worth less, to a place where they are worth more. This service has given to the merchandise a new value which it had not before; as much so as is given by a tailor to a piece of cloth, which he had made into a coat, or by any other mechanic, when he has, in the way of his trade, changed the form of a thing, and converted it into what is technically called in the civil law, a new species. Though here has been no change in the form of the thing, yet there has been a service performed by which it has received a new and additional value, as certain and as distinguishable from its former value as that which is given by a mechanic who converts one species into another. It is a general principle of law, extending to a great variety of cases, that a person who has, by his own labor, thus added a new value to a specific article, has a lien on the article for the value of his service. It is a right consonant to all

ideas of natural equity, and is highly favored by the law.[1]

503. Freight, in its general signification, is applied to all rewards, hire, or compensation paid for the use of ships, and the same rules are applicable to passage-money as are established on the subject of freight. In the legal sense of the term, the compensation paid for the transportation of passengers is freight, the same as the compensation paid for the transportation of goods.[2] Ships engaged in carrying passengers on the high seas for hire, stand, as we have observed in a previous chapter, on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandise, the passage-money being equivalent to the freight. It follows, therefore, that on a breach of a passenger contract, and damage resulting, the ship as well as the owner is bound to respond. All the reasons in the maritime law for charging the ship in case of the breach of a contract of affreightment of goods and merchandise, apply with equal force in the case of the breach of a passenger contract, and the one is as much the appropriate subject of Admiralty jurisdiction as the other.[3]

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[1] Poland v. The Freight and Cargo of the Brig Spartan, Ware's R. 134, 138; 2 Kent's Com. 496.

[2] Giles v. The Cynthia, 1 Peters' Adm. R. 206; The Brig Lavinia, Ibid. 126; M'Culloch's Com. Dict.; Pothier, Traite de Chartepartie, n. 1; Watson v. Duykinck, 3 John. R. 335; Greggs v. Austin, 3 Pick. 20.

[3] The Aberfoyle, Blatchford's Ad. R. 360; The Pacific, Ibid. 569; The General Smith, 4 Wheat. R. 438; Rules of Ad. Prac., 12, 14, 17, 18; Benedict's Adm. 163. The jurisdiction of the

504. This doctrine was declared, in the case of

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Admiralty over contracts for the transportation of passengers has been a subject of more or less doubt. It has been supposed, that the Admiralty could not assume jurisdiction to enforce a passenger contract, as against the passenger, because it was said no lien attached to the person of the passenger, and therefore no proceeding *in rem* could be maintained, and that the Admiralty had no jurisdiction at all, simply *in personam*, in cases arising *ex contractu*, except in the single instance of seamen's wages. Opinion of Mr. Justice Johnson in Ramsay v. Allsgre, 12 Wheat. R. 611; Bains v. The Schooner James and Catharine, 1 Baldwin's R. 544; The Brig Hercules, Gilpin's R. 184. If we decide the question upon the ancient authorities, we shall find that the Admiralty has jurisdiction of a contract of this nature (a passenger contract), which it may exercise *in personam* as against the passenger, and both *in personam* and *in rem*, as against the ship and her owner. And the modern authorities, especially the more recent, conform to the principles established by the more ancient.

In the case of The Brig Hercules (*ut supra*), the decision upon the precise point involved was undoubtedly correct. The remnants and surplus of money in Court were appropriated to claims which were precedently attached as liens to the things from which the money was produced. That is, doubtless, the safest principle upon which a Court of Admiralty can proceed in such cases. The demand for passage-money was a personal claim, and gave no lien upon the property saved from the wreck. But Judge Hopkinson, in addition to the obvious ground of decision, proceeded to say that a contract between a passenger and the master of a vessel for the passage "is strictly a personal contract, not made at sea, nor for any cause cognizable in the Admiralty." The weight of authority is against this position. The contract, it is true, is made on land, but the performance of it is on the sea, or on navigable waters. And that is exactly the position of a contract for the payment of freight for the carriage of goods. The commencement and consummation of the contract in both cases are exclusively on the land, but the intermediate and indispensable portion of the performance is on waters within the Admiralty jurisdiction; vide Peters' Adm. R. 126, n. Mr. Benedict in his work on Admiralty Jurisdiction and Practice,

The Aberfoyle,[1] and again in the case of the Pacific.[2] The former was the case of an emigrant ship from Liverpool to New York. The breach of the contract occurred in the course of the passage, the passengers having been kept for many days on short allowance of bread and water, the master having omitted, intentionally or otherwise, to lay in a proper supply of stores. It was held that the ship was chargeable, and upon established principles. The contract was a maritime contract to be performed on the high seas, and the passenger, therefore, was entitled to the remedy against her, the same as the owner of the cargo in case of the breach of a contract of affreightment. In the one case, the ship is bound to carry the goods safely to the destined port, according to contract, for the freight; in the other, the passenger and his baggage for the passage-money.

505. Where the contract, whether for the carriage of goods or passengers, is an entire one, and in its essence a proper subject of Admiralty jurisdiction, that jurisdiction is not ousted by any accompanying stipulations, which are incidental and subsidiary to the main purpose.[3] As the contract is an entirety, the failure to comply with any part of it goes to the whole. Both parties have a right to demand a strict compliance with every part, and, in case of refusal,

p. 163, says that the rights of passengers, in various forms, have been often the subject of suits in Admiralty in the Southern District of New York, and that the jurisdiction is there fully established, both in the District and Circuit Courts. Vide The Pacific, Blatch. R. 569.

[1] Blatchford's Rep. 360. [2] Ibid. 569. [3] Ibid.

to consider the contract as broken, and resort to the proper tribunal for redress. Neither is bound to accept a part performance.[1]

[1] The Pacific, Blatchford's R. 579. This was a libel *in rem*, filed in the District Court of New York, against the ship Pacific, then lying in the port of New York, for breach of a passenger contract. The libel set forth that the vessel was bound on a voyage from New York around Cape Horn to San Francisco in California; that her owners agreed with the libellant at New York to take him as a cabin-passenger, together with his luggage, the fare to be $300; that in order that this class of passengers might have all the accommodations desirable for so long and tedious a voyage, and sufficient space for exercise and air, not more than fifty cabin-passengers were to be received on board; that the passage-money was, by reason thereof, raised to $300, instead of being $250, the usual charge; that state-rooms between decks were to be fitted up, making separate apartments for two passengers each, the rooms to be arranged on each side of the vessel, leaving a free passage-way between, disencumbered with freight, for ventilation and exercise; that the vessel was to sail on or about the 5th of January, 1849; that the libellant's passage-money was paid on the 2d of that month; that the libellant, who was a resident of Massachusetts, prepared himself for the voyage at considerable expense, and came to the city of New York at the time appointed for the departure of the vessel, for the purpose of embarking in her and starting on the voyage, when he found that the state-rooms, instead of being fitted up, as was agreed for the accommodation and health of the passengers, had no space between them for ventilation or exercise, in consequence of the increased number that had been constructed; that seventy-two cabin-passengers had been engaged for the voyage, and were to be taken on board, the price as to many of them having been reduced to $275 each, by reason whereof the vessel was overcrowded with passengers and cargo, and rendered incommodious and dangerous to health; that the libellant, on ascertaining these facts, refused to embark, and demanded a return of his passage-money, which was refused. The libel was filed on the 20th of January, 1849, claiming a return of the passage-money, and damages to the amount of $1000. The claimants filed a demurrer

506. In order to give jurisdiction to the Admiralty *in rem*, where the contract is maritime in its nature and subject, it is not essential that the ship should have entered upon the performance, and that the breach should have occurred in the course of the voyage. Hence, if she refuses to receive the cargo on board, when it is at her side ready to be delivered, or the passenger with his luggage when he is ready to embark, the ship is bound, and the party aggrieved may proceed in the Admiralty *in rem*. Maritime contracts do not depend upon locality, but upon the subject-matter and the nature of the service to be performed; and, when entered into for the conveyance of goods or persons in a particular ship, they bind the ship for the due performance of the service. The ship itself *in specie* is considered as pledged for the performance, and this, whether the vessel be in the immediate employment of the owner, or be let by a charter-party to a hirer who is to have the whole control of her. The obligation results directly from the contract, and not from the performance, which is simply in fulfilment and discharge of it.[1]

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to the libel, alleging that the contract on which it was founded was not one of which the Admiralty could take cognizance; and that if the same, or any part of it, was cognizable in the Admiralty, no cause of action had arisen on it at the time the libel was filed. The District Court overruled the demurrer, and pronounced for the libellant for the return of his passage-money, and his damages. The claimants appealed to the Circuit Court, where the decree of the District Court was affirmed.

[1] The Pacific, Ibid., Nelson, J. It was incidentally held, in this case, in answer to the argument of the claimants' counsel, that in the case of a contract with a material-man, or one for repairs, the liability of the vessel arises from the furnishing of the supplies,

507. The contract for the carriage of goods being an entire one, it follows that the shipper is not bound to pay freight, unless there is a performance on the part of the carrier. The goods must be delivered at the port of destination, except in the cases hereafter specified, or no freight is earned. For a partial conveyance is not within the terms or intent of the contract. And it is no answer to a denial of freight that the whole voyage was defeated by an overwhelming calamity, common to the whole adventure, which prevented a delivery of the goods, and rendered a sale of them necessary at an intermediate port. On the other hand, the shippers are bound to pay the full freight for the voyage, if the cargo is carried to the port of destination, and specifically remains, notwithstanding at its arrival it is, by reason of sea damage, utterly ruined and worthless. And after the shipment of the cargo on the voyage, the shippers have no right to demand it at any intermediate port, short of the port of destination, without full payment of the freight for the voyage, whether the cargo arrive there in a damaged or undamaged state.[1]

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or the making of the repairs. Hence, if the owner should refuse to permit the repairs for which he had contracted, the ship would not be liable. Short of actual repairs or supplies, the parties must look to the master or owner for any damages in case of a breach of contract, as no lien attaches to the vessel within the terms of the rule.

[1] Jordan v. Warren Ins. Co., 1 Story's R. 342, 352; Miston v. Lord, Blatchford's R. 355; The Ship Nathaniel Hooper, 3 Sumner's R. 554; Caze v. The Baltimore Ins. Co., 7 Cranch. R. 358, 362; Halwerson v. Cole, 1 Spears' R. 323; Hunter v. Princeps, 10 East's R. 378; Hunter v. The Union Ins. Co., 1 Wash. C. C. R. 530.

508. If, however, the voyage is broken up in consequence of the goods being in such a state as would endanger the safety of the ship and the lives of the crew, if carried, no freight is due; because, independently of any duty that the master owes to the cargo, the interest of his owners dictates the breaking up of the voyage; and the shipper having derived no benefit under his contract, there is no principle, legal or equitable, that would subject him to any part of the freight. And if the cargo is so much damaged that to proceed with the voyage would render it worthless, it is the duty of the master to land and sell it at the port of necessity, in the absence of instructions from the shipper, even though it may be in a condition to be carried *in specie* to the port of destination, and there landed. In cases of necessity happening during the voyage, the master is, by law, created the agent for the benefit of all concerned; and his acts done under such circumstances, in the exercise of a sound discretion, are binding upon all parties in interest.

509. And in such a case the carrier is entitled, it seems, to no freight. In the case of the Ann D. Richardson,[1] it was held that the master having failed to deliver the cargo according to the bill of lading, and there having been no waiver of performance, either express or implied, by the shipper or his agent at the port of distress, the owner of the vessel was not entitled to freight, notwithstanding the damaged state of the cargo justified its sale by the master at the port of distress; that the agency

[1] Blatchford's R. 358, note.

of the master on behalf of the shipper at the port of distress, arising out of the necessities occasioned by the disaster, was limited to the sale of the cargo; that no case had extended it further, and that sound principles forbade any further interference with the rights of the shipper.

510. In Halwerson v. Cole,[1] the Court said that the only cases where the owner of the goods is bound to pay full freight without delivery are those in which the goods have been thrown overboard for the general benefit, or so used as to make the loss of them a subject of general average. "In such cases,"

[1] 1 Spear's (S. C.) R. 321. This was an action to recover the amount of forty-five dollars twenty-two cents, for freight, being the balance due for freight of twenty bales of hay, and one hundred and five bags of corn, &c., &c., shipped on board of the schooner United States, and to be delivered at Pilatka, East Florida. It was proved at the trial that the twenty bales of hay and the one hundred and five bags of grain were shipped on board of the schooner United States, of which the plaintiff was captain, by Zealy & Wade, the agents of the defendant, on the 27th day of October, 1840; and that the amount of freight to be charged was sixty-six dollars twenty-five cents, at two dollars per bale of hay, and twenty-five cents per bag of grain. The schooner, before arriving at Pilatka, put into St. Augustine, Florida, in distress, having received damage from a gale; and it was found, on examining her cargo, that the twenty bales of hay were damaged, and were ordered to be sold, for the benefit of the owners, by the surveyors of the port of St. Augustine, and that the net amount of the sale, after deducting the expenses attending it, amounted to thirty-five dollars, eighty cents. The balance of the cargo, to wit, the one hundred and five bags of grain, were delivered at the port of destination. The defendant was also charged with the sum of fourteen dollars, twenty-seven cents, being his proportion of an account for general average.

the Court observed, "the payment of the general average is a substitution for delivery, and subjects the owner to the payment. There are some cases where the owner is liable to pay partial freight, or *pro rata intineris;* but the obligation to pay this can arise only from an agreement to accept the goods at a place short of the place of destination. In the case of Hunter v. Princeps,[1] the vessel had been captured, recaptured, and carried into St. Kitt's, where she was wrecked, and the goods sold by order of the Court of Admiralty, and on the application of the captain, but without orders. The sale was made for the benefit of all concerned, and the application on the part of the captain for the sale *bona fide.* Yet it was held that the shipper was not bound to pay freight even *pro rata intineris,* but was entitled to recover for his goods, without any deduction for freight. The only ground upon which the plaintiff's case can be placed, with any appearance of plausibility, is, that in the condition in which the captain was placed, he was so far the agent of the shipper as to be authorized to determine on the expediency of selling the damaged goods, for the benefit of the owner. Now, it does not seem to me that this position can be maintained. There is no authority to sustain it. The master is the general agent for the ship-owners, and cases may arise in which his act might bind both the insured and insurer; but I have found no case where, on the question of freight, he is considered the agent of the shipper, in a matter of personal interest to himself. It would involve the absurdity that one of two parties to a contract

[1] 10 East. R. 378.

was the agent of the other, to determine the expediency and necessity of dispensing with the performance of his part of the agreement. But, besides this, the liability of such an agency to abuse, and the strong temptation to abuse it, are sufficient reasons why no such principle should be established as a part of the law of the contract. Cases may arise, in which there may exist a necessity for disposing of a damaged cargo. If it be for the general benefit, it may be a subject of general average. But, in all other cases, the shipper has a right to insist on the delivery of the goods, as a condition precedent to the payment of freight. It is no answer to say the shipowner acted *bona fide*, and the sale was for his benefit. He has commissioned no one to judge for him on that subject. He may prefer to have the goods in a damaged state. It is his right, and cannot be withheld from him without a forfeiture of the demand for freight."

511. It is not pretended, and there is no authority for subjecting the shipper to freight, where the port of distress and of acceptance of the cargo is the port of shipment, and where no part of the voyage has been performed.[1] The right to freight does not commence until the ship has broken ground and begun the voyage; and therefore no partial payment can be claimed for goods laden on board, if the ship is prevented, even without the fault of the master, from setting forth on the voyage.[2]

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[1] Miston v. Lord, Blatchford's R. 357; vide, also, Jordan v. Warren Ins. Co., 1 Story's R. 352; Violett v. Stettinius, 5 Cranch, C. C. R. 559; Scott v. Libby, 2 John R. 336.

[2] Curling v. Long, 1 Bos. & Pul. 634.

512. There are exceptions to the general rule that no freight is due unless the goods are delivered at the port of destination. But they stand on special grounds. If it is shown that the non-arrival was occasioned by no default or inability of the carrier ship, but was occasioned by the default or waiver of the merchant shipper, then, upon the ordinary principles of commercial law, full freight is due. In the former case, the merchant shipper cannot avail himself of his own default to escape the payment of freight; in the latter case, he dispenses with the entire fulfilment of the original contract for his own interest and purposes.[1]

513. To perfect the right to freight, there must be not only a conveyance of the goods, but a delivery of them. The conveyance and delivery of the cargo is a condition precedent, and must be fulfilled. But if the delivery be prevented by the act of the shipper, or if he dispense with it, the master may then demand his whole freight. Or, if the voyage is performed, and the goods tendered to the consignee at the port of destination, but an order of the government of the country prevents their being

[1] The Ship Nathaniel Hooper, 3 Sumner's R. 342; Bork v. Norton, 2 M'Lean's R. 422; Halwerson v. Cole, 1 Spear's R. 323. Upon the subject of this chapter, the cases arising in the Courts of common law have been freely cited; and they furnish a safe guide in the investigation of questions of this nature. "In the interpretation of commercial contracts," says Mr. Justice Story (3 Sumner's R. 555), "the decisions of these Courts (the Courts of common law) are entitled to the fullest consideration and weight; for, in general, they guide, although they do not always control, Courts of Admiralty in the exercise of their own judgment in the interpretation of such contracts."

landed, freight is due nevertheless. This doctrine was declared in the case of Morgan v. The Bank of North America,[1] and is in conformity with the French ordinance of 1681,[2] (upon which, indeed, the decision is founded,) which declares that "if it happen that commerce be prohibited with the country to which a ship is in the course of sailing (*en route*), and the ship be obliged to return with its lading, there shall be due only the freight outward, though the ship be hired out and home." The case is distinguishable from that of a non-arrival in port by reason of a blockade, for, in the latter case, the outward voyage is not performed; and it is impossible to say that, if there had been no blockade, it would have been performed.[3]

514. An interruption of the regular course of the voyage happening without the fault of the owner, does not operate to deprive him of his freight, provided the ship afterwards proceed with the cargo to the port of destination, as in the case of capture and recapture, or as in the case of detention arising from an embargo at the port of departure, or in the course of the voyage, or from a blockade or hostile investment of the port of departure, after the voyage has actually commenced.[4] We have elsewhere seen

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[1] 4 Dall. 421.

[2] Liv. 3, tit. 3, art. 15. Vide also Code de Com., art. 299.

[3] Vide, upon the subject of this section, Lane v. Penniman, 4 Mass. 91; The Volunteer, 1 Sumner, 551; Certain Logs of Mahogany, 2 Sumner, 589; Bradstreet v. Baldwin, 11 Mass. R. 229; Palmer v. Lorillard, 16 John. R. 346.

[4] Abbott on Shipp., p. 493; Hadley v. Clark, 8 Term. R. 259; M'Bride v. Mar. Ins. Co., 5 John. 308; Baglies v. Fettyplace, 7

that, if the cargo is of a perishable nature, and cannot endure the delay, the shipper is entitled to receive it, paying to the carrier a reasonable sum for the time, labor, and expense, already bestowed upon the contract.[1] If, on the other hand, the voyage is broken up, after its commencement, by war or interdiction of commerce with the place of destination, the contract is dissolved, and the freight gone.[2]

515. We are now briefly to notice some of the more important principles respecting freight, proceeded upon in the administration of Prize Law. It should be observed, however, that the doctrines of Prize Courts, as to freight, are not generally applicable to cases of mere civil commercial adventures, or cases of civil salvage. Courts of Prize exercise a very peculiar and extensive jurisdiction, *sui generis*, upon very enlarged views, and a sort of international discretion, which do not belong to the common functions of other Courts, or even of Courts of Admiralty, in the exercise of their jurisdiction, as Instance Courts.[3]

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Mass. 325; The Racehorse, 3 Rob. Ad. R. 101; Beal v. Thompson, 3 Bos. & Pul. 420, 431. If the voyage be broken up, and lost upon the passage by capture, so as to cause a complete defeasance of the undertaking, the freight is gone, notwithstanding there was a subsequent recapture. The Hiram, 3 Rob. Ad. R. 180; Palmer v. Lorillard, 16 John. R. 348; The Isabella, 4 Rob. Adm. 77. As to deviation, vide Souter v. Baymore, 7 Barr, 415; The Ninetta, Crabbe's R. 534.

[1] Vide Flanders on Maritime Law, chap. 5, tit. Dissolution of the Contract of Affreightment.

[2] Liddard v. Lopez, 10 East, 526; The Hiram, 3 Rob. Adm. 180; Scott v. Libby, 2 John. R. 336.

[3] The Ship Nathaniel Hooper, 3 Sum. 542, 556.

516. There is a broad difference between the doctrines of English and American prize law upon the subject of freight, arising from the wholly distinct and variant principle upon which those doctrines are based. The Courts of the United States do not admit that the capture of a neutral ship operates to dissolve the contract of affreightment. They hold that it only suspends it; and, when restitution takes place, the parties are restored to their antecedent rights. The *vis major* having ceased, the *jus postliminii* operates upon the case.[1] The English Courts, on the contrary, hold that a capture of the ship and cargo, followed by an unlivery of the cargo, by order of the prize Court defeats the contract. Upon restitution taking place, if it is not a concurrent act, that is, if ship and cargo are not restored at the same time, the master is not bound to await the result of the proceedings as to the cargo, but acquires a right to proceed, and a right to his full freight.[2]

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[1] The Ship Nathaniel Hooper, 3 Sum. 542, 556.

[2] The doctrine of English prize law upon this subject may be found in the following cases:—The Racehorse, 3 Rob. 101; The Martha, 3 Rob. 106, note; The Hoffnung, 6 Rob. 231; The Wilhelmina Eleonora, 3 Rob. 234. In the case of The Racehorse, a British ship was freighted from Liverpool, in ballast, to St. Martin's and Lisbon, to bring a cargo of fruit to Ireland, and was taken on her return voyage by a French privateer off Falmouth, and afterwards recaptured and brought into Falmouth. Upon the capture, the master was taken out; and, owing to that fact, no claim was given into the Court of Admiralty for the cargo until the 17th of July, the ship having been restored by consent on the 2d of July; and restitution of the cargo was not decreed until the 16th of November. A claim was made for the full freight of the voyage, although the vessel refused to wait until the restitution of the cargo, the owner of the ship being dead,

517. By our law, no freight is due, unless the master, upon the decree of restitution passing, pro-

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and his administrator declining to interfere. Lord Stowell allowed the full freight, upon the ground that the ship was not bound to wait. "The case of the cargo," he observed, "was litigated; and is the Court to say that the ship was to stay, and wait the result of the proceedings, when she herself had been restored, whilst the cargo was contested, and might be condemned, and whilst it was by no means clear that any cargo would remain to be carried on? This would be an unreasonable expectation. I do not say that a party is to act in a hasty manner, and to run away immediately on the restitution of the ship. Something is to be conceded in the way of accommodation; a reasonable time is to be allowed; and if it is not allowed, a proportion of the freight may be deducted. But I cannot say that a ship shall wait all this time for the mere chance of taking on the cargo, if eventually it should be restored. It is said that the contract was totally dissolved; but by whose means happened it that it was so dissolved? It was in no degree owing to the owner of the ship, who might have carried on the cargo, but that the owner of the cargo was not ready to proceed. Though he acted as discharged from his contract, he is substantially entitled to the benefit of it. On these grounds, I am of opinion that the ship is entitled to her whole freight." He deducted, however, from the freight its contributory share for the salvage on the recapture. In the case of The Martha, the circumstances were different. An American ship, bound from America to Amsterdam, was captured in the Channel by a British cruiser, and brought in on the 20th of December, 1800; and the ship was restored on the 10th of January, 1801. On the 15th of January, a commission of unlivery passed; and on the 16th, one-fourth of the goods composing the cargo was restored. It being necessary, in order to get at these goods, to unliver the rest of the cargo, the whole was accordingly unlivered. The claimant of the goods insisted on the ship's taking them on board again, offering to be at the expense of the reshipment, and to have them carried on to their destination upon the original freight. This was refused by the master; and the question was, whether he was entitled to full freight on these goods or not. Lord Stowell gave the full freight,

ceeds to the port of destination, and delivers the cargo. It was held, in the case of The Copenhagen,[1] that if a neutral ship is driven into the port of a country at war, and is seized, together with the cargo, upon suspicion that both are enemy property, but are finally restored, not, however, concurrently, but at different times, the cargo, if first restored, and sent on in other vessels, must pay to the original ship *pro rata* freight. This is, doubtless, the correct principle, in a case where the goods are sent on with the ship-owner's consent. But, suppose he should insist upon detaining the goods, until the event of the proceedings against the ship was known. Would

upon the mere dry authority of a decision of Sir James Marriott, which he thought himself bound to follow. The subsequent case of The Hoffnung was the case of a capture of a neutral ship and cargo in August, 1815, made by a British cruiser. On the 1st of September, a decree of restitution of the ship was passed; and a commission of unlivery of the cargo was on the same day taken out by the captors, and the unlivery was completed on the 26th of September. Notice was given to the master, before the unlivery of the whole of the cargo, that he would be required to carry it on the voyage. The claim for the cargo was given in on the 24th September; and on the 28th of the same month the cargo was restored. The master was then required to take it on board again; but he refused, and made a claim for full freight. Lord Stowell, upon the authority of the case of The Martha, held the ship entitled to full freight. "The contract between the parties," he said, "ceased by the act of unlading. At the moment of separation, the vessel acquires a right to proceed; and it is by accident only that she continues here. That accident cannot, I think, have the effect of reviving the contract which had been before dissolved." The reader will find a very able criticism of the doctrine of these cases, by Judge Story, in the case of The Ship Nathaniel Hooper, 3 Sum. 544.

[1] 1 Rob. Adm. R. 289.

he not be entitled to say: "I claim the full benefit of my contract; if the ship is condemned, I lose my freight; if restored, I insist upon going on, and performing the contract?" Would he not have the right, in a case where the cargo is of such a nature that it could endure the delay, to detain it a reasonable time, to ascertain the result of the prize proceedings? By our law, as already observed, if the ship is first restored, the master, to entitle himself to freight, must await the result of the proceedings as to the cargo, and carry it on to the port of destination. The same principle obviously applies when the cargo is first restored.

518. Where a neutral vessel is captured on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo. This rule was adopted for the benefit of the ship-owners, and to prevent the rights of war from pressing with too much severity upon neutral navigation. If, therefore, a neutral vessel is captured coming from an enemy's port, under suspicion of having on board the property of the enemy—a cargo, which she has a perfect right to carry, provided it was not attended with any circumstances of ill faith or unneutral conduct, in such a case the demand for freight is an absolute demand. The captor is bound to discharge the vessel, and pay the stipulated freight.[1]

[1] The Fortuna, Edwards' Adm. R. 56; The Prosper, Ibid. 72, 76; The Der Mohr, 4 Rob. Ad. R. 314; The Ann Green, 1 Gallis. R. 283.

519. Where the ship belongs to an enemy, and the goods are neutral, the captor, if he carries the goods on to the port of actual destination, is entitled to the freight, on the ground that the contract has been fulfilled. The captor stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract.[1] An admitted exception to the general rule is, where the proceeds of the goods are ultimately intended for the country to which the captors have brought them, and they have been saved from the grasp of the enemy by the capture, then full freight is allowed.[2]

520. To the general rule, that the neutral carrier of enemy's property is entitled to his freight, there are exceptions which it is well to notice. If the neutral be guilty of fraudulent and unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of

[1] The Vrow Anna Catharina, 6 Rob. 269; The Fortuna, 4 Rob. R. 278; The Diana, 5 Rob. R. 67.

[2] The Ann Green, 1 Gallis. R. 283.

blockade, the penalty of confiscation of the vessel has also been inflicted.[1]

521. Although it is the policy of the general maritime law to make the freight dependent upon the performance of the voyage, the parties may, by express agreement, control the operation of the general principle. If, therefore, they expressly or impliedly agree that a part of the freight shall be paid absolutely, and not depend upon the performance of the voyage, they are at liberty to do so.[2] The general principle, however, deducible from the maritime codes, and sanctioned by the English and American Courts, is clearly this, that if freight is paid in advance, and the goods are not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary.

522. Chancellor Kent (then Chief Justice), in the case of Watson v. Duykinck,[3] thoroughly examined the doctrine of the maritime law upon this point, and adjudged it in conformity to the principle here stated. Where the execution of the contract is prevented by the fault of the shipper or passenger (passage-money and freight being governed by the same rule), the money paid in advance is not recoverable

[1] The Commercen, 1 Wheat. R. 382.

[2] Abbott on Shipp., 491.

[3] 3 John. R. 325. Vide also Lemon v. Gordon, 8 Car. & Pay. 392; Andrew v. Moorhouse, 5 Taunt. 435; Gillen v. Simpkin, 4 Camp. 241; The Brig Lavinia, 1 Peters' Adm. Dec. 126; Pitman v. Hooper, 3 Summ. R. 50, 66; Mansfield v. Maitland, 4 B. & A. 582; Cope v. Dodd, 1 Harris, R. 33.

back. It is an ancient form of expression, that freight is earned "empty for full," when the disappointment is owing to the misfortune or neglect of the freighter, and no laches are imputable to the master or owner of the ship.[1]

523. It has been supposed that there is a distinction between payment of freight and an advance of it. This distinction was urged in the case of Griggs v. Austin, and it was contended that the freight was recoverable back in the latter case, but not in the former. But this distinction is unsupported by either reason or authority. An advance of freight means the same thing as payment of freight beforehand or in advance; whether the whole is paid, or a part, makes no difference.

524. If the cargo consists of living animals, whether men or cattle, and some of them should die during the voyage, without any fault or neglect of the persons belonging to the ship, and there is no express agreement respecting the payment of freight, the general rule is that freight shall be paid for the dead as well as for the living. If, however, the agreement be to pay freight for the transportation of them, then no freight is due for those that die on the voyage, because as to them the contract is not performed.[2]

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[1] 1 Peters' Adm. R. 207, note; Detouches v. Peck, 9 John. R. 210.

[2] Abbott on Shipp., p. 498; Walcott v. Eagle Ins. Co., 4 Pick. 434; Kent's Com. vol. 3, p. 225; Dig. 14, 2, 10; Roccus, n. 76, 77, 78. "When slaves or horses," says Roccus, "are carried

525. Where goods are sent in a general ship, and the parties enter into no agreement respecting the freight, the amount will be determined by the usage

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on freight, and any of them die on board, is freight payable for such as are dead? Three cases are to be noticed. First, If the charter-party express that freight shall be paid for so many men or animals as shall be put on board, and any of them die before the ship reaches her destined port, freight is due, because the contract is fulfilled; and it is a principle of law, that a person who has engaged to do a particular act for a certain reward, is entitled to receive the reward, if he has been prevented from performing his engagement by any other means than his own fault.[1] The second case is where freight is promised for conveying men or animals to a certain place, and before the ship's arrival at that place any of them die, freight is not payable for those that are dead, because the contract is not complete by which freight was promised for their actual conveyance. Freight is not due in this case, even though the loss happen without any fault on the part of the mariners; for it is a matter of indifference how the accident occurred, since the payment of freight was conditional, to wit, *if the slaves are conveyed*. The third case is, when it does not appear precisely for what freight was to be paid; whether for taking the animals into the ship, or for their actual conveyance. In this case, freight must be paid, if they are merely taken on board, although the animals or slaves should die before the ship reaches the destined port. The reason is, that it does not appear expressly what was intended; and as no fault is shown on the part of the sailors, the contract remains entire, and the whole freight must be paid. A doubtful contract must be construed against the shipper."

[1] Mr. Ingersoll, the translator of Roccus, observes as follows, upon this note: "Our author seems to forget the just and liberal principles which he expressed in Note XXIX. If the doctrine quoted from the civil law govern this case, it will apply equally well to that which he states in the ensuing note, on which he gives a contrary opinion. 'The word *freight* implies *ex vi termini*, that something is to be carried from one place to another. Therefore, whenever freight is stipulated for, it must be understood to be for actually carrying the things or the persons shipped, and not for the mere permitting them to be put on board.'"

of trade. If there be a special agreement, the rights of the parties will be governed by it, and no obligation will be intended beyond those which are imposed by it.[1]

526. In the case of a charter-party, where the charterer hires, either the whole or a specified part of the vessel, he is bound to pay the stipulated freight, whether he makes use of the whole or the part, as the case may be, or not. If the whole vessel is chartered to take a cargo, at certain specified rates per ton, if the freighter does not furnish a full cargo, the owner of the vessel is entitled to freight, not only for the cargo actually put on board, but also for what the vessel could have taken, had a full cargo been furnished.[2]

527. Where, by the terms of the charter-party, the vessel is to go abroad for a cargo to a designated port, and upon her arrival there, no cargo is put on board in pursuance of the covenants of the charter-party, the merchant is liable to pay the whole freight which would have been earned if he had complied with his agreement. This is the doctrine of the maritime law, and it is in accordance with the common law.[3]

528. If it is a condition of the charter-party that the merchant shall put on board the specified cargo, or shall load the whole vessel, or a specified part of

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[1] Robertson v. Bethune, 3 John. R. 342.

[2] Duffie v. Hayes, 15 John. R. 337.

[3] Kleine v. Catara, 2 Gallis. R. 61.

it, upon its arrival at a certain place, without any unreasonable delay, and the master of the vessel applies for the cargo on a Sunday, and finding no person ready to deliver it, refuses to wait until Monday, but goes to sea without it, the ship-owner is not only not entitled to the stipulated freight, but, on the contrary, is bound to make compensation to the shipper for any loss sustained in consequence of the captain not waiting and taking on board the stipulated cargo.[1]

[1] Dunbar v. Buck, 6 Munf. R. 34. In this case it appeared that a contract was made in November, 1807, between Robert Dunbar, of Falmouth, and David Henderson, of Fredericksburg, for the shipping of one thousand bushels of corn by Dunbar, in a vessel belonging to David Henderson & Son, to be carried to the Island of Antigua, and there sold on his behalf. He had the requisite quantity at home, and put on board at Fredericksburg six hundred and seventy-nine bushels; but having purchased about five hundred bushels of a Mr. John Skinker, whose plantation, called the Hopyard, lay some miles lower down the Rappahannock, and Skinker having urgently pressed him to take it away, he proposed to Henderson that the vessel should take in the balance of the thousand bushels at the Hopyard, to which the latter agreed, but said he should expect the vessel would meet no unreasonable delay. To guard against this, Dunbar, on a Saturday afternoon, furnished the captain with bags to hold the corn, and expecting the vessel to drop down the river on Sunday, and receive it on Monday morning, sent his agent to have it measured and put on board at that time; but the captain, when he arrived at the Hopyard, finding the overseer either absent, or unwilling to deliver the corn on the Lord's day, proceeded on his voyage without it. When the captain returned with the account of sales, a charge was made against Dunbar for dead freight on three hundred and twenty-one bushels of corn, as so much not delivered by him according to contract, which charge he considered highly unreasonable, and, on the contrary, contended that Henderson ought to make him compensation for the loss in the sale, occasioned by the fault of his agent,

529. If a freighted ship becomes disabled during her voyage, the master has his option of two things: either to refit in a reasonable time, or to hire another ship to carry the goods; and if he does this, or if the shipper will not consent to it, he will be entitled to the whole freight. It seems, from the general language of the authorities, that it is not imperative upon the master to tranship the cargo, unless there be another vessel in the same or a contiguous port, which he is able to hire. In a case of necessity, instant, unforeseen, and unprovided for, the character of agent and supercargo is forced upon the master, and in that capacity he is bound to act for the best interest of all concerned. If, in the execution of such a trust, he procures another vessel to take on the cargo, the freighter is bound to pay the *extra* freight, if any, for the renewed voyage in the vessel procured by the master, that is, the freight beyond what would have been earned under the original charter-party, if the necessity of hiring another vessel had not intervened.[1]

530. Where the charter-party contains an express stipulation for the payment of freight from a certain day, for a certain number of months, and so much

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the captain, in not taking on board the full quantity. Henderson insisted on retaining the dead freight, and refused to make good the loss. The Supreme Court of Appeals held in conformity with the doctrine of the text.

[1] Emerigon, tom. i. 429–433; The Gratitudine, 3 Rob. Ad. R. 240; Miller v. Fletcher, 1 Doug. 231; Searle v. Scovell, 4 John. Ch. 221; Shipton v. Thornton, 9 Ad. & Ellis. 314; 3 Kent, 212; Mumford v. Com. Ins. Co., 5 John. R. 262.

longer as the vessel shall be employed by the charterers, they are bound to pay freight during the time the vessel may be undergoing repairs, provided the ship was sufficient at the outset of the voyage, and also that there was no improper delay in repairing her.[1]

531. If a ship is chartered for a voyage at a certain sum per month, for so long a time as the charterers may continue her in their employ, they are bound to pay freight during the time of detention, occasioned by a hostile seizure, provided she is afterwards released, and performs her voyage. The doctrine applicable to a case of this nature is, that the ship-owner must be paid for the whole time the ship is out of his possession in virtue of the contract, whether her voyage be long or short, and by whatever accident she may be delayed; provided the delay does not arise from his own default, and also that the voyage be finally completed.[2]

532. When A. takes a charter-party of a vessel for a voyage to a certain port and back, at a certain sum per month, payable three days after her return, the owners furnishing officers, crew, and provisions, he has a right to load the vessel himself, or allow others to do it, under express contract with him. But neither the master nor owners have a right to take goods on board without the charterer's permission, or on his behalf. Nor have they any right

[1] Ripley v. Scaife, 5 Barn. & Cres. 167; Havelock v. Geddes, 10 East, 555.

[2] Spafford v. Dodge, 14 Mass. R. 66.

to demand freight of the sub-shippers. They must look to the terms of the charter-party, and follow them.[1]

533. In a case where the owners, by charter-party, engaged their vessel to take a cargo to a designated port, at a specified freight, and it was agreed by the parties that twenty running days should be allowed for unloading and discharging the vessel after her arrival at the port of destination, and that, for every additional day's detention, the shippers should pay fifty dollars demurrage, it was held that the stipulation of payment for demurrage did not affect the contract for freight; and if the consignee failed to unload and discharge the vessel within the lay days allowed, there being no impossibility of his doing so, and afterwards, while the vessel was detained on demurrage, the vessel and cargo were lost, without the default of the master or mariners, the ship-owners are entitled to recover the freight, as well as the demurrage.[2]

534. If the master of a steamer, by false representations, induces an agent of a third person to ship merchandise on his boat at a certain freight,

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[1] Perkins v. Hill, 2 Wood. & M. R. 158. See, also, Weston v. Minot, 3 Wood. & M. 436, where it was held that freight contracted for in gross, for a voyage out and in, cannot be apportioned and recovered for a part of the cargo, or a part of the voyage, unless, from some expression in the contract, or nature of the voyage, or act of the hirer of the vessel, or measure of the government, an apportionment becomes feasible and just.

[2] Brown v. Ralston, 9 Leigh's R. 532; Lacombe v. Waln, 4 Binney, 299.

and the bill of lading states that the merchandise is taken "with the privilege of reshipping," and it is reshipped on another boat and brought to the port of destination, the owner of the merchandise cannot require its delivery before paying the freight due to the boat on which it was so reshipped, the contract by the master of the second boat having been made in good faith, at a reasonable rate, with a party who held a possession apparently fair, under a bill of lading authorizing a reshipment. The bad faith of the master of the first boat does not operate to deprive the owners of the second boat of the remuneration due for their labor. Not being mere agents of the first carrier, they have a lien on the goods for their freight.[1]

[1] Walker v. Cassaway, 4 Louis. R. 19. But see Robinson v. Baker, 5 Cushing, R. 137, where it was held, that a common carrier who innocently receives goods from a wrong-doer, without the consent of the owner, express or implied, has no lien upon them, for their carriage, against such owner. See also York v. Grenough, 2 Ld. Ray. 866; King v. Richards, 6 Whart. 418; Fitch v. Newberry, 1 Doug. (Mich.) 1; Burkirk v. Purin, 2 Hall, 561; Saltus v. Everett, 20 Wend. 267, 275. There is a distinction between the cases here cited and the doctrine of the text. In the former case, the carrier receives the goods from a wrong-doer: he receives them innocently, it is true, but he might have inquired into the title. *Caveat emptor* is the principle that applies to him. In the latter case, it is the carrier who is the wrong-doer. But the shipper might have informed himself of the truth of the carrier's representations. Third parties are not to suffer from his want of prudence or diligence. In Evart v. The Brig Lowndes, 5 Louis. R. 426, it was held, that in an action against a vessel and owners for the non-delivery of freight, the defendants may, under the general issue, introduce testimony to show that the identical goods claimed by the plaintiff were shipped by another person, who took a bill of lading for them. See, also, Devillers v.

535. Cases may occur where the question as to the liability of the carrier for the loss of the goods, or injury to them, may depend very much upon the question whether he was entitled to freight. Thus, when a steamboat is in the habit of charging freight for carrying remittances of money, if a package containing money is handed to the captain, without informing him of its contents, there being no charge for freight, the owners of the vessel are not liable for the money in case of its loss. The captain, in such a case, would be responsible merely as depositary.[1]

536. It is universally conceded that the master of a carrier ship, on his arrival at the port of delivery, has a right to retain the goods until the freight is paid by the consignee. But when the right to detain is not insisted upon, and the goods are delivered to the person authorized to receive them, without the payment of freight, the lien is gone, and the law will imply no agreement on the part of the person receiving them to pay the freight.[2] Maritime liens differ essentially from liens recognised by the common law, and distinctively in this: that in cases where the lien by the common law is lost by parting with the possession of the thing, in those same cases, in the maritime law, it continues. But the maritime law, equally with the common, discountenances these secret encumbrances upon

Schooner John Bell, 6 Louis. 544, as to liability of the carrier in cases of reshipment.

[1] Mechanics' and Traders' Bank v. Gordon, 5 Louis. R. 604.

[2] Scaife v. Tobin, 3 B. & Adol. 523.

property in all cases where no public policy is subserved by sustaining them, and the rights of third parties would suffer from their continuance. Hence, where the master gives up the goods to the consignee, without the payment of freight, he gives up, at the same time, his lien. It is different from the case of a material-man consenting to the departure of a ship upon which he has a lien. It is for the benefit of commerce that the vessel should not be detained; and therefore the maritime law wisely provides that the lien shall continue, notwithstanding she goes upon her voyage. But no public policy is subserved by permitting the lien of the master upon the goods for his freight to continue after he has parted with the possession of them. On the contrary, serious injury would be likely to ensue to the rights of third parties, if it were sustained.

537. The right to retain the cargo for the freight has grown out of the usage of trade, and does not exist, nor can it be enforced, when the parties have expressly regulated the time and manner of paying freight by stipulations in a charter-party, and especially if the cargo is deliverable before the arrival of the periods of payment. Such an agreement, if inconsistent with the continuance of the lien, will be construed as an express renunciation of the right to insist on freight before the cargo is delivered.[1]

[1] Chandler v. Belden, 18 John. R. 157; Chase v. Westmore, 5 M. & Selw. 180; Crawshay v. Hornfray, 4 Barn. & Ald. 50; Gracie v. Palmer, 8 Wheat. R. 605; Ruggles v. Bucknor, 1 Paine, C. C. R. 358; The Schooner Volunteer, 1 Sumner's R. 550; Certain Logs of Mahogany, 2 Sumner, 589; The Schooner

The party must resort to his action.[1] If, however, he has been induced to deliver the goods to the consignee by a false and fraudulent promise of the latter that he would pay freight as soon as they were received, the delivery will not amount to a waiver of the lien, but the carrier may disaffirm, and sue the consignee in replevin.[2]

538. If the master notifies the person who receives the goods that he must take them, subject to the charge for freight, the person so receiving them becomes liable therefor. Or if, by the terms of the bill of lading, the goods are to be delivered to the consignee, or to his order, on payment of freight, the party receiving them, whether the consignee or an endorsee, to whom the bill of lading has been transferred by the consignee, makes himself responsible for the payment of freight. The law implies a promise on his part to pay the freight, such being the terms on which, by the bill of lading, the goods were to be delivered. The person who accepts and receives the property thereby makes himself a party to the contract. When the consignment, therefore, is to A., or his order, and A. endorses the bill of lading, and orders a delivery to B., to whom accordingly the goods are delivered, B. becomes bound to pay the freight, and A. is discharged.[3]

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Cassius, 2 Story's R. 81; Clarkson v. Edes, 4 Cow. 470; Pickman v. Woods, 6 Pick. 248; Pinney v. Wells, 10 Conn. 104.

[1] Shatzell v. Hart, 2 A. K. Marsh. 191.

[2] Bigelow v. Heaton, 6 Hill (N. Y.), 43.

[3] Merian v. Funck, 4 Denio, 110; Grant v. Stone, 1 N. J. R. 292; Trask v. Duval, 4 Wash. C. C. R. 184; Cock v. Taylor, 13

539. But whilst the liability of the consignee is admitted where he receives goods under a bill of lading such as we have here described, it does not follow that the consignor is exempt. There is no shifting of liability. The contract of the consignor and consignee is not considered to be inconsistent with each other; each is an original contract upon a sufficient consideration.[1] In commercial transactions, nothing is more common than that there should be several persons, all of whom are liable for the same thing. And in this country the cases all proceed upon the principle that the clause in the bill of lading, "He" (the consignee) "paying freight," is introduced for the benefit of the carrier, not of the consignor.[2]

East, 399; Spence v. White, 1 Iredell's R. 236; Hayward v. Middleton, 3 M'Cord, 121; Layng v. Stewart, 1 Watts & Serg. 222; Roberts v. Holt, 2 Show. R. 432; Douglass v. Kemble, 3 Bing. 383; Brouncker v. Scott, 4 Taunt. R. 1.

[1] Grant v. Wood, 1 N. J. 292; Barker v. Havens, 17 John. R. 234; Domett v. Beckford, 5 B. & Adol. 521. But see Van Zeller v. Sanders, 2 Gale & Dav. 244.

[2] In the case of Moorsom v. Kymer, 2 Man. & S. 318, Mr. Justice Bailey supposed that the consignee is liable only where the consignor is not. "Where the bill of lading," he observes, "expresses that the goods are to be delivered to the consignee, or his assigns, he or they paying freight for the same, if the captain deliver the goods to the assigns without procuring the freight for them, I am not prepared to say that he can resort back to A. B., the shipper, where A. B. has never expressly stipulated that he will pay the freight." In the case of Drew v. Bird, 1 Moody & M. 156, Lord Tenterden ruled, at Nisi Prius, in accordance with the opinion of Justice Bailey. In that case there was no charter-party. The bills of lading stated the goods to be "shipped by A. Bird" (the defendant), "by the ship Medora, for London, to be delivered to E. Griffiths, for The Imperial Distillery, or to his

540. But if the goods are not owned by the consignor, and are not shipped on his account, and for his benefit, in that case, it was said in Barker v. Havens,[1] the carrier is not entitled to call on him for freight. And, on the other hand, if the consignee is only the agent of the consignor, and is known to the master to be acting in that capacity, he does not make himself debtor for the freight by accepting the consignment, or entering the goods in his own name at the custom-house.[2]

541. The master has a lien upon the freight for all the advances which he may make on account of the ship, and can intercept it, when earned, to reim-

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assigns, he or they paying freight for the same." The goods were conveyed to London, and delivered to Griffiths without receiving freight. Afterwards, and after several ineffectual applications to Griffiths and to the Company for payment, the plaintiffs applied to the defendant by letter, and received an answer that "if Griffiths did not pay, he, the defendant, would." On this state of facts, Lord Tenterden, in summing up to the jury, said: "Independently of the letter of the defendant, I think there is nothing to entitle the plaintiffs to a verdict. The bill of lading directs them to deliver to Griffiths, he paying freight; they deliver them without receiving it. *They cannot thereby make Bird liable to them, if he were not so originally; and on the face of the bills of lading nothing appears to charge him.*" But the authority of Drew v. Bird was overruled by the subsequent case of Domett v. Beckford, 2 Nev. & M. 374, where it was held that the consignor is liable for freight, although by the bill of lading the goods are to be delivered to the consignee, *he paying freight for the same*, and they are delivered to the consignee without payment being required. See also Shepherd v. De Bernales, 13 East, 565, and also the observations of Mr. Sergeant Shee, in Abbott on Shipping, p. 511, note.

[1] 17 John. R. 234; 3 Kent, 221, note.

[2] Ward v. Felton, 1 East, 507.

burse himself.[1] Whether he has such lien for his wages, is a controverted point in our jurisprudence. Whenever the question has been presented for judgment in the Courts of Common Law, it has been ruled that such lien does not exist.[2]

542. But it was held by Judge Ware, in the case of Drinkwater v. The Freight and Cargo of the Brig Spartan,[3] that the master's lien for his wages rests on as good ground as for his liabilities or disbursements. "The money," he said, "is as much due to him in the one case as the other, and the credit has in each grown out of the same service, a service which has contributed to create the fund against which his claim is made. I can see no sufficient reason for

[1] The Ship Packet, 3 Mason's R. 255; The Brig Spartan, Ware's R. 160; Hodgson v. Butts, 3 Cranch, 140; Lane v. Penniman, 4 Mass. R. 91. See ante, Chap. 13.

[2] Lewis v. Hancock, 11 Mass. 72; Ingersoll v. Van Bokkelin, 7 Cowen, 670; S. C., 5 Wend. 314. It was said in the latter case, that the agreement for wages is a personal contract with the owner, and that there was no substantial grounds of equity for giving him a preference over other creditors. Any one, said the Chancellor, in giving his opinion, who is sufficiently intelligent and discreet to discharge the responsible duties of master, must be perfectly competent to provide for his own wages in the contract. On the other hand, the reasons which render it proper for the master to hypothecate the ship and freight to procure the necessary supplies occasioned by some unforeseen disaster in a foreign port, and which, by the maritime law, give a lien upon both, to persons who have furnished those supplies, or whose property was taken for the purpose, in the nature of a forced loan, seem to be equally applicable to the case of the master where the requisite supplies have been furnished from his own property, or on the pledge of his individual credit.

[3] Ware's R. 163.

making a distinction between them. His wages are as much a charge on the earnings of the ship as those of the seamen, or as the advances which he makes for incidental expenses. What remains, after these are discharged, constitute the net freight of the owners. Besides, if the reason given for excluding the master from Admiralty process against the ship, that he has a lien on the ship, means anything, it means that he is a privileged creditor against the freight. A lien *ex vi termini* imports a privilege. If it is not this, it is nothing. Upon the whole, finding that he has a lien on the freight for his disbursements, and seeing no reason in law or justice for making a distinction between this claim and that for wages, I do not feel the authority for introducing a distinction against him which I do not find established." If this doctrine is founded upon the correct principle, it follows that the master has a right, as against his owners, to receive the freight, and that payment of it to the owners, on their demand, will not be a discharge against a claim by the master.

543. In a case where a consignee, known as such to the master, sells the goods before they are landed, and the buyer receives them, and enters them in his own name at the custom-house, the buyer becomes liable for the freight. Although there be no original priority of contract between the purchasers from consignees and the owner, yet the taking of goods by purchasers under a bill of lading, is evidence of a new agreement by them, as the ultimate appointees of the shippers, to pay the freight for the carriage of the goods, the delivery being stipulated with the

shippers to be made to the consignees named in the bill of lading or their assigns, he or they paying the freight for the same.[1] It seems obvious that the assignee of a bill of lading, who receives the property mentioned in it, is liable to the owner of the ship for the freight.

544. If, however, the assignor is bound by charter-party to pay it, or if the person who is sought to be charged with the freight promised to pay it, not absolutely as owner, but conditionally, if the assignor did not, and as surety for him, and received the goods not as the assignee of the bills of lading, but as agent and surety of the supposed owner, in neither of these cases does the law raise an implied promise, on the part of the receiver of the goods, to pay the freight.[2] But even here if the master should claim freight of the receiver of the goods, before they were delivered, and deliver them subject to the charge, there would arise an auxiliary original contract between the receiver and the ship-owner for the freight. And more especially would this be the case, if the master refused to deliver the goods without an express promise from the consignee or assignee of the bill of lading to pay the freight.[3]

545. When the goods become so much deteriorated during the voyage as not to be worth the freight, it is an important question whether the merchant is

[1] Abbott on Shipp., 511; Cock v. Taylor, 13 East, 399. See also Collins v. Union Trans. Co., 10 Watts, 384.

[2] Moorsom v. Kymer, 2 M. & S. 303; Trask v. Duvall, 1 Wash. C. C. R. 181.

[3] Abbott on Shipp., p. 513, note by the English editor.

bound to receive them, or is at liberty to abandon them to the master in discharge of freight. The point has been directly adjudicated in this country. It arose in the case of Griswold v. The New York Ins. Co.,[1] and it was held that the owner had no right to abandon the deteriorated goods in discharge of the freight. The consideration for the freight is the carriage of the article shipped on board, and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his lien to the goods conveyed. It cannot be deduced from the nature of the undertaking. The ship-owner performs his engagement when he carries and delivers the goods. The condition which was to precede payment is then fulfilled. The right to payment then becomes absolute, and whether we consider the spirit of this particular contract, or compare it with the common law doctrine of carrying for hire, no principle can be discovered which makes the carrier an insurer of the goods as to their soundness, any more than he is of the price in the market to which they are carried. If he has conducted himself with fidelity and vigilance in the course of the voyage, he has no concern with the diminution of their value. It may impair the remedy which his lien afforded, but it cannot affect his personal demand against the shipper. If the deterioration has arisen from the negligence, carelessness, or improper conduct of the master or crew, the damage will be deducted from the freight.[2]

[1] 3 Johns. R. 321; 1 John. R. 205.

[2] Edwards v. Todd, 1 Scammon's R. 463; Leech v. Baldwin, 5

546. But if the deterioration has arisen from an intrinsic principle of decay naturally inherent in the goods themselves, whether active in every situation, or only in the confinement and closeness of a ship, the merchant must bear the loss as well as pay the freight.[1] No freight is due for goods which perish during the course of the voyage from perils of the sea. This is the doctrine of the maritime law, and the decision of the Court in the case of Frith v. Barker[2] is in conformity with it.

547. In that case it appeared that fifty hogsheads of sugar were shipped on freight. They were pro-

Watts, R. 446; Humphrey v. Reed, 6 Whart. R. 435. In Glover v. Dufour, 6 Louis. R. 490, it was held, that where casks of wine had been so badly stowed, that in a gale of wind of no great violence, they were turned with the bungs down, so as to cause leakage through the vent-holes left for the fermentation of the wine, the vessel was not entitled to freight. In the case of Knox v. The Ninetta, Crabbe's R. 534, where the goods were accepted by the consignee, and in a damaged condition, it was contended that the carrier was thereby discharged from liability. "This, I think," observed Randall, J., "is confounding the liability of the party to pay freight with the liability of the vessel for damage. It is true, that if a consignee accepts goods which arrive in a damaged state he is bound to pay freight, and in England he could not plead the damage by way of set-off, but was put to his separate action to recover it. How far this circuity of action would be encouraged in this country it is unnecessary now to determine, as this is a libel for the very damage sustained, but this disposes of one of the points made by the proctor for the libellant: that the freight was forfeited by the conduct of the master. I do not think so. The libellant seeks to recover what he would have obtained had the wheat been delivered in a sound state, and must therefore pay what he would have been obliged to pay had it been so delivered."

[1] Abbott on Shipp., 517. [2] 2 John. R. 327.

perly stowed, but during the course of the voyage the ship leaked, owing to tempestuous weather, by means of which the sugar was washed out, and upon the arrival of the vessel at the port of destination, the hogsheads were empty, and some of them fell to pieces. It was held that no freight was due. The sugar was as effectually destroyed as if it had at once been swept into the sea, and gone to the bottom. Bringing into port the empty hogsheads was not bringing the hogsheads of sugar, which the carrier had undertaken to do.[1] The authorities all concur upon the point that no freight is due for casks leaked out by perils of the sea, as the subject-matter of the contract no longer exists. But, if the commodity is lost by other causes than the perils of the sea, such as internal decay, leakage, evaporation, and the like, the freight is due nevertheless.[2]

548. In a case where the master has been under the necessity of selling part of the cargo to defray the expenses of the ship in a foreign port, the owners of the cargo, if they have been the authors of the delay by which the expenses were occasioned, are bound to pay full freight upon all the goods. This doctrine proceeds entirely upon the assumption that the owner of the cargo is *in delicto*, and that the sale resulted from his fault.[3] If a part of the cargo is sold, from necessity, to obtain provisions or repairs, in that case, inasmuch as the owners are bound to pay to the merchant the price which the goods

[1] See also Pothier, Charte-Partie, No. 60.

[2] 2 John. R. 327.

[3] The Angerona, 1 Dod. Adm. R. 382.

would have brought at the port of destination, they are justly entitled to charge him with the freight that would have been due, had the goods been conveyed thither. So, too, if part of the cargo is thrown overboard for the necessary preservation of the ship and the remainder of the goods, and by that means the ship is preserved, and performs the voyage, the value of the part sacrificed is to be answered to the merchant by way of general average, and the value of the freight thereof to the owner.[1]

549. If the goods are captured on the voyage, then recaptured, and restored upon payment of salvage, freight is to be paid in proportion to the voyage performed and the property saved, after deducting the salvage. The salvage is a loss to which, by law, vessel, freight, and cargo, are liable to contribute, and therefore diminishes freight *pro tanto*.[2]

550. Where the ship is chartered for a specific sum, for the voyage, the contract, as before observed, is an entire one; and the general rule is, that, unless it be entirely performed, by a delivery of the goods at the port of destination, no freight is due. Consequently, if part of the cargo is lost by perils of the sea, and part conveyed to the place of destination, there can be no apportionment of the freight, under the charter-party. That is to say, if

[1] Abbott on Shipping, p. 514.

[2] Pinto v. Atwater, 1 Day's R. 193.

the ship-owner seeks to recover upon the charter-party, he is bound by its terms, and therefore precluded from obtaining freight, because he has not fully performed the conditions of his contract. It is presumed, however, that a Court of law would sustain a special action on the case (a part of the cargo being carried to the port of destination, and there accepted), founded on the implied assumpsit, arising from the acceptance of the goods, unless, indeed, it should appear, from the particular words of the charter-party, that the parties intended to make the freight absolutely dependent upon the delivery of the whole cargo.[1] In the case of a general ship, or one chartered for freight, to be paid according to the quantity of goods, freight is due for what the ship delivers.[2]

551. Where, before abandoning a vessel from necessity, the seamen take out a portion of the goods into the boat, and are afterwards taken up at sea, and carried into port by salvors, it is held that no freight is due on the goods so saved; and for the very valid reason that no part of the cargo is delivered by the ship. The salvors, and not the ship-owner, are the deliverers of the goods saved. There is, in such a case, no part performance by the ship-owner, and no dispensation of performance by the owner of the goods.[3]

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[1] Post v. Robertson, 1 John. R. 24.

[2] Ritchie v. Atkinson, 10 East, 295; 3 Kent's Com. 227. See also Weston v. Minot, 3 W. & M. 436, as to apportionment of freight.

[3] Dunnett v. Tomhagen, 3 John. R. 154.

552. We have elsewhere seen that where a ship is forced into a port short of her destination, and in her present condition cannot finish the voyage, the master must repair in a reasonable time, or proceed in another ship. If, however, the owner of the cargo will not wait for the repair, nor consent to the transhipment, the master will be entitled to the whole freight. He stands ready to fulfil his contract, but is prevented by the shipper. If, on the other hand, the master refuses to go on with the voyage, his claim for freight is gone; he has not fulfilled his contract. But if the shipper voluntarily accepts the cargo at the port of distress, or at an intermediate port, freight is due in proportion to the voyage performed, *pro rata itineris peracti*.[1]

553. What will amount to a voluntary acceptance, is a question of fact, to be determined by the circumstances of each case. It cannot, however, be inferred from the circumstance that the shipper consented to receive the proceeds, in a case where the goods were sold, without his authority, at an intermediate port. This amounts only to a ratification of the sale of the goods, and a consent to receive the money in lieu of the claim for the goods and a nonperformance of the contract. Thus, when a vessel was captured and condemned as prize of war, but the cargo was given up, and delivered into the hands of a passenger, who, without any authority from the shipper, sold it, and remitted to him

[1] Abbott on Shipping, p. 525, note, and authorities there cited; 3 Kent's Com. 228.

the proceeds, the fact that he received them did not operate to make him liable for freight *pro rata*.[1]

554. In cases where *pro rata* freight is due, it is a question of importance upon what basis it shall be computed. In Luke v. Lyde,[2] the rule of apportionment adopted was to calculate how much of the voyage had been performed when the disaster happened. In the case of Marine Ins. Co. v. Lennox, decided, in 1801, by the Court for the Correction of Errors, in New York, the rule adopted was to ascertain how much of the voyage had been performed, not when the ship first encountered the peril, and was interrupted in her course, but when the goods had arrived at the intermediate port, because *that* is the extent of the voyage performed, as it respects the interest of the shipper.

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[1] Escopiniche v. Stewart, 2 Conn. 391. Judge Story, in his edition of Abbott on Shipping, p. 549 (5th ed.), gives a summary of the American authorities upon the subject of *pro rata* freight, which deserves attention. "A voluntary acceptance," he says, "may, in some of them, be thought to mean no more than an acceptance of the goods, or their proceeds, whether it has resulted from choice in waiving any further transportation of the goods, or from that moral necessity which the impossibility of pursuing the voyage, or otherwise preserving the goods, might impose upon the owner or his agents. If the owner or his agents should refuse to pay any freight at the time of receiving them, or should receive them with a protest against freight, or with a denial of any right to claim it, or if his agents should merely act, in the absence of the owner, for the benefit of all concerned, there could arise no implication of any contract to pay freight resulting from the mere acceptance of the goods or their proceeds." Vide Welch v. Hicks, 6 Cowen, 504.

[2] 2 Burr. 882.

555. In the case of Robinson v. Marine Ins. Co.[1] it was said by Kent, C. J., that this rule appeared to be more just than that in Luke v. Lyde, but owing to the circumstances of that case, the latter rule was followed. The rule adopted in Massachussetts is, that the ship-owner shall receive his whole freight for the voyage, deducting the amount of the freight necessary for the subsequent transportation of the goods to their port of destination.[2] This latter rule seems to be just and equitable. The freight is calculated upon the basis of the benefit received by the shipper by the transportation of the goods to the intermediate port, with reference to their ultimate destination.

556. The general principles of law, with respect to freight, may be controlled by the special contract of the parties. When their wishes and intentions are fairly expressed, they are bound by them. If particular terms are employed in the charter-party, the rights of the contracting parties will be governed by the interpretation which the law puts upon those terms. The general rules that have been adopted by our Courts, in the construction of charter-parties, are in accordance with the established principles of British law adopted in the interpretation of similar contracts. When the parties, by their agreement, make the outward and homeward voyage one, and the profit dependent upon the entire performance, no freight is due if the return cargo is not delivered, notwithstanding the shipper may have had the benefit of the outward voyage.

[1] 2 John. R. 323. [2] Coffin v. Storer, 5 Mass. R. 252.

557. Thus, in the case of Barker v. Cheriot,[1] a ship was chartered from New York to Martinico and back to New York, for the entire sum of forty-five hundred dollars, which was to be paid in sixty days after the delivery of the return cargo at New York. The ship delivered her outward cargo at Martinico, and on her return voyage with the homeward cargo was captured and carried into Antigua, where the cargo was libelled in the Prize Court, and detained for further proof, subject to the lien of freight. The ship returned to New York without the cargo. The cargo was afterwards appraised by the Prize Court, and upon further proof was ordered to be restored to the claimants; but neither the cargo nor its proceeds had ever come to the hands of the owners or their agents. It was held that under the charter-party there could be no recovery of freight, because the voyage was an entire one, and as the vessel was captured upon her return, and did not deliver her return cargo, the contract was not performed. The entire sum could be claimed only in the event of the completion of the entire voyage. *Pro rata* freight was not due, because there was no acceptance of the cargo. The master ought to have waited at Antigua for the removal of the detention of the cargo, especially as he would have been entitled, on an eventual condemnation, to his freight from the captor; for the Court of Vice-Admiralty admitted his lien for freight.

558. Where the voyage out and home is an entire one, and freight contingent on its performance, the

[1] 2 Johns. R. 352, vide.

performance of the outward voyage, and the acceptance of the outward cargo by the freighter, gives no claim to *pro rata* freight, if the return voyage is not performed, and this because of the entirety of the contract.[1] If, however, on the return voyage, the

[1] Penoyer v. Hallett, 15 John. R. 332; Hamilton v. Warfield, 2 Gill. & John. 482. In the case of Brown v. Hunt, 11 Mass. 45, the general principle, that if one entire whole voyage or whole service is stipulated for in the charter-party, the ship-owner cannot sue on the charter-party, unless the whole voyage or whole service is performed, was fully recognised, but the Court were of opinion that upon the terms and provisions of the charter-party, that was a case of separate and distinct voyages, and that the ship-owner was entitled to recover freight up to the conclusion of a particular passage of the ship. So, in the subsequent case of Locke v. Swan, 13 Mass. 76, the general principle was adopted, but the Court thought that the voyage described in the charter-party was divisible, and that the freight, up to a certain period, might be recovered. So, too, in the recent case of Towle v. Kettell, 5 Cushing's R. 18, the general principle was recognised, and applied as admitted law. In that case, it appeared that the vessel sailed from Boston under a charter-party, executed on the 27th of June, 1846, in the usual form "for a voyage," as described therein, "from Boston to Wilmington, N. C., and from thence to Cape Haytien, in the Island of Hayti, and from thence back to Boston," the defendants engaging to pay the plaintiff "for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say, fifteen hundred dollars, say, so much in Hayti as the master may want for the disbursement of the vessel, and the balance on the discharge of the cargo in Boston, together with all port charges, lighterage, and pilotage in Hayti," and the master to have what freight could be got from Boston to Wilmington. The voyage out was performed; but the vessel was lost on the return voyage. It was held that no freight was due. The charter-party was construed to mean one entire voyage; it declared it to be so in terms, and nothing indicated divided voyages. See also Blanchard v. Buckram, 3 Greenleaf. R. 1; Havelock v. Geddes, 10 East, 555.

ship is wrecked, but the cargo is saved, and carried on to its port of destination by the shipper, to whom it was delivered with his assent, he must pay a *pro rata* freight to the place of shipwreck.[1]

559. It is proper to observe, that the transfer of the title to a general ship transfers accruing freight. Of course, the moment there is a delivery of the cargo, the connexion between the ship and freight is ended, and a transfer of the ship thereafter does not include the freight.[2]

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[1] Coffin v. Storer, 5 Mass. 252.

[2] Pelayo v. Fox, 9 Barr. R. 489.

## CHAPTER VII.

### OF STOPPAGE IN TRANSITU.

560. If goods are consigned on credit, and, before their delivery, the consignee becomes bankrupt, or suspends payment, the law reserves to the consignor the right to countermand their delivery.[1] This is called *stoppage in transitu*. The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his possession at the termination of the voyage, unless he shall have previously sold them *bona fide*, and endorsed over the bills of lading to the purchaser.[2]

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[1] Biddlecombe v. Bond, 4 Ad. & Ell. 332; Vertue v. Jewell, 1 Camp. 31; Walter v. Ross, 2 Wash. C. C. R. 283; Ryberg v. Snell, Ibid. 294, 403; Conyers v. Ennis, 2 Mason, 236. In the case of Rogers v. Thomas, 20 Conn. 63, upon the question of the insolvency of the consignee, as involving the right of stoppage *in transitu*, the Court said, "We think, therefore, that in order to authorize a stoppage *in transitu*, there should be some ostensible and certain criterion by which the insolvency of the vendee may be ascertained; and that it should consist of some visible change in his pecuniary situation,—some open, notorious act on his part, calculated to affect his credit,—some change in his apparent circumstances, which would operate as a surprise on the vendor, and which if he had known, he would not have given credit to the vendee."

[2] Stubbs v. Lund, 7 Mass. 453; Balderston v. Mauro, 2 Cranch. C. C. R. 623; Sawyer v. Joslin, 20 Vt. 172.

561. Lord Hardwicke, in the case of Snee v. Prescott,[1] said that, even after the goods were delivered to the principal, he could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come in as a creditor only, for a shilling, perhaps, in the pound, unless the law went upon the general credit the bankrupt had gained by having them in his custody. But it is well settled, both in England and this country, by a long and uninterrupted course of decision, that the consignor or vendor, in cases of insolvency or stoppage of payment, can reclaim the property only while it is in its transit.[2]

562. But if the sale or consignment of the goods was procured by fraud, the vendor or consignor may reclaim them after they have passed into the hands of the vendee or consignee, or into the hands of an innocent purchaser; and this upon the ground that the vendor or consignor still retains the legal right in the goods; that the fraudulent vendee or consignee can pass no title, because he has acquired none; and, although the purchaser may be wholly innocent, he is no more so than the original proprietor, who parted with the possession from the contrivances of fraud; and as, between two equally innocent persons, claiming either a legal or equitable right, his which is prior in time prevails.[3]

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[1] 1 Atk. R. 245. See also Inglis v. Usherwood, 1 East, 515; 3 B. & P. 469; 2 Esp. R. 614.

[2] Conyers v. Ennis, 2 Mason, 236, and Abbott on Shipp., 614, note 1.

[3] Ash v. Putnam, 1 Hill's R. 302. See also Nellis v. Bradley,

563. If, at the time of the consignment, the consignee is insolvent, whether that fact be known or unknown to the consignor, he has no right to intercept the goods in their transit. To enable him to do that, the insolvency must intervene between the consignment and the exercise of such right. If, when he makes the consignment, he knows of the insolvency of the consignee, the law will not interpose to protect him from the consequences of his own folly. If he does not know of it, he might have acquired the information, or insisted upon security, but doing neither, he must abide the result of his indiscretion.[1]

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1 Sandford's Sup. Ct. R. 560, and Rogers v. Thomas, 20 Conn. 53. In this latter case, it was said by the Court, that the right of reclamation possessed by the vendor, where the goods were obtained by fraud, may be exercised at any time after the vendor has parted with the possession, and whether they are in the hands of the vendee or of any other person, *excepting one to whom they have been transferred by the vendee, bonâ fide, and for a valuable consideration, advanced or given on the strength of them.*

This conflicts with what was laid down in Ash v. Putnam, but the "better reason," we cannot but think, is with that decision.

[1] Buckley v. Furniss, 15 Wend. 137; Rogers v. Thomas, 20 Conn. 53; Smith's Com. Law, 547; Oliver's Law Sum., 116. In the case of Naylor v. Dennie, 8 Pick. 198, where it was held, that an attachment of goods on board a vessel, as the property of the consignee, does not defeat the right of the consignor to stop them *in transitu*, Parker, C. J., in delivering the opinion of the Court, said, "This right (stoppage *in transitu*) is founded upon an implied condition in the sale, that if the vendee should become insolvent, *between the shipment of the goods, and the reception of them by the vendee*, the vendor shall have the right to rescind the contract, and reclaim the goods." On the other hand, in the case of Donath v. Broomhead, 7 Barr, 303, Rogers, J., in delivering the opinion of the Court, said, "That the right of a vendor, on the *discovery of*

564. The right of stopping *in transitu* is adverse to that of the consignee, and must be exercised adversely. It is not meant that the right should be exercised in hostility to him, but simply that it cannot be exercised under a title derived from him.[1] Hence, where goods are consigned to A. on his account and risk, and before their arrival he becomes insolvent, and assigns them to B., who covenants to receive and sell them for the use of the consignor, but without his knowledge, they are, nevertheless, liable to be seized as the property of the consignee, by his creditors.[2]

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*the bankruptcy or insolvency* of the party to whom he has sold goods on credit, to retake them before actual or complete delivery, is the well-settled doctrine of both Courts of law and equity." The obvious import of this language is, that upon the *discovery* of the insolvency of the vendee, whether it occurred anterior or subsequent to the sale, the vendor may retake the goods if they have not yet come into the possession of the vendee. The point was not involved in the decision of the Court, and probably was not definitely presented to his honor's mind, for he subsequently says, "Short of this, the right exists, and is much favored; for, as it is said, it is unreasonable to allow the goods of the vendor to be appropriated to the payment of other creditors if the vendee *fails before payment, and before the goods have actually reached him.*" Here, it would seem from the language employed, that the right of stoppage would depend upon the fact of insolvency occurring after the sale, and before payment and delivery, and not upon the *discovery* of an insolvency which existed anterior to the sale and shipment. But, as we have already observed, the point was not presented for decision, and from the language of the Court, was evidently not critically considered, and I am not aware of any case in the Pennsylvania Reports, where the judgment of the Court has been invoked upon the precise question.

[1] 15 Wend. R. 137; 8 Pick. 198.

[2] Lane v. Jackson, 5 Mass. 157; Ash v. Putnam, 1 Hill's R.

565. There is no doubt that an insolvent consignee may, before he receives the goods, disagree to the consignment, and that the assent of the consignor will be presumed, unless in a reasonable time he declares his dissent, or neglects to give notice of his assent. That he may avail himself of this disagreement, it is the duty of the consignee to give reasonable notice of it, and equally the duty of the consignor, within a reasonable time, to declare his intention. For if he remains silent after notice, his assent will no longer be presumed. If the goods arrive before the consignor can have notice that the consignee has disagreed to the shipment, any person, at the request of the consignee, may receive and take charge of them until the consignor is notified, and an intermediate attachment will not defeat his right. For the insolvent consignee having refused to receive them, the goods are *in transitu*, and may be seized by the consignor while they continue *in transitu*. And on his giving notice of his arrest, within a reasonable time, to the disagreement of the consignee, the contract is rescinded *ab initio*, and nothing ever passed by it to the consignee. But where the consignee undertakes, as in the instance given, to assign the goods, and authorizes a sale of them for the use of the consignor, the law puts a different construction upon the transaction. The assignment is not a disagreement, but an affirmance of the contract, and the law will not presume that the consignor would consent to the appointment of a factor, with power to receive and sell. The authority of

(N. Y.) 302; Scholfield v. Bell, 14 Mass. 40; Feise v. Wray, 3 East. R. 93; Siffken v. Wray, 6 East, 371.

the factor is derived from the consignee, and necessarily supposes an interest in the goods.[1]

566. The right of stoppage *in transitu* is an extension of the right of lien, which, by the common law, the vendor has upon the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law. The effect of its exercise is not to rescind the contract, or to revest the general property in the vendor, but to reinstate him in his lien, by placing him in the same position, as if he had never parted with the possession.[2]

567. The vendor, if he would repossess himself of the goods, is bound to relieve them of all charges

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[1] Lane v. Jackson, 5 Mass. 157.

[2] Rowley v. Bigelow, 12 Pick. 313; Stanton v. Eager, 16 Pick. R. 475; Newhall v. Vargas, 15 Maine, 320. Lord Abinger, in his sketch of the progress of the law with respect to stoppage in transitu, in the case of Gibson v. Carruthers, 8 M. & W., presumes that the doctrine may be a part of the law of merchants which prevails generally on the Continent of Europe,—the proof of which from time to time, combined with its manifest justice and utility, at length introduced it into the common law of England, of which the law merchant, properly understood, has always been reckoned to form a part. He says, that "In Courts of Equity, it has been a received opinion that it was founded on some principle of common law. In Courts of Law, it is just as much the practice to call it a principle of equity, which the common law has adopted. This was strongly insisted upon by Mr. Justice Buller in his celebrated judgment in the House of Lords, in the case of Lickbarrow v. Mason. It has also been said by Lord Kenyon, that it was a principle of equity adopted by the common law to answer the purposes of justice. The most eminent equity lawyers that I have had the opportunity of conversing with in times that are gone by, were unanimous in representing it as the offspring of a Court of Equity."

and burthens rightfully and necessarily accruing after he parted with the possession of them, and this for the obvious reason, that the vendor cannot be allowed, by his attempt to regain possession, to put the vendee in a worse position than he would have been had the possession remained with the vendor. And this requires him to pay the freight and intervening charges.[1] But the vendor, to be entitled to exercise his right of stoppage, is under no obligation to refund what he may have received as part payment.[2]

568. Since the exercise of the right of stoppage *in transitu* does not rescind the contract, it necessarily follows that the vendee or his assigns may, notwithstanding, recover the goods, on payment of the price, and that the vendor, on the other hand, may sue for and recover the price, provided he be ready to deliver them upon payment. If he has been paid in part, he may stop the goods for what remains unpaid, and the part payment only has the effect to diminish the lien *pro tanto* on the goods detained.[3]

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[1] Newhall v. Vargas, 15 Maine, 320; Code Napoleon, B. 3, c. 11, t. 3, a. 579; 1 Wheat. R. 212, note (*f*).

[2] Newhall v. Vargas, 13 Maine, 108.

[3] Hodgson v. Loy, 7 T. R. 440; Rymer v. Sowercropp, 1 Camp. N. P. 109; Newhall v. Vargas, 13 Maine, 108. Upon the question, whether a stoppage *in transitu* operates to rescind the contract, the English Courts have arrived at no authoritative decision. In the case of Clay v. Harrison, 10 B. & C. 106, Lord Tenterden observed that it had been argued on the part of the defendant, that the effect of the stoppage *in transitu* was to rescind the contract, and to revest the property in the original owners; while, on the

569. A foreign merchant, who, for a commission to himself, purchases upon his own credit, and ships upon the credit which he gives to his employer, is a consignor or vendor, entitled to exercise the right of stoppage *in transitu*.[1] And in every case, where the consignor is substantially the vendor, the right

part of the plaintiff, that it only restored to the owners a right of possession, and placed them in the same situation as if they had not parted with the goods. There does not appear, he continued, to be any case in which this point has been expressly decided. But he was of opinion, under the peculiar circumstances of that case, that the bankrupt, after the stoppage *in transitu*, had no property in the goods insured. In the case of Wentworth v. Outhwaite, 10 M. & W. 452, which occurred some years after, Baron Parke, in delivering the opinion of the Exchequer Chamber, said, "What the effect of stoppage in transitu is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet decided, and there are difficulties attending each construction. If the latter supposition be adopted (as most of us are strongly inclined to think it ought to be, on the weight of authority), the vendor is entitled to retain the part actually stopped *in transitu* till he is paid the price of the whole, but has no right to retake that which has arrived at its journey's end. His right of lien on the part stopped is revested, but no more. My Lord Chief Baron has expressed an opinion, to which he still adheres, that the contract is rescinded by a stoppage *in transitu*, but he does not think that this affects the right of the vendee to retain that portion of the goods which have been actually delivered to him, or, in other words, have reached the place of their destination, more especially when the goods and the price may be apportioned, as in the present case, and a new contract be implied from the actual delivery and retention of a part. In either view of the subject, the stoppage of that portion of the goods conveyed by water affords no defence."

[1] Illsley v. Stubbs, 9 Mass. 65; Fiese v. Wray, 3 East, 93; Newhall v. Vargas, 13 Maine, 103.

exists, and may be exercised. So, too, where the consignor has a divided interest in the subject of the consignment, as where the goods are sent to the consignee to be sold on joint account, in that case he is considered to be in the character of a vendor, and therefore entitled to exercise the right.[1] A factor, who having purchased goods for his principal, and made himself liable to the original vendor, is not precluded from exercising the right of stoppage *in transitu*, from the fact of his taking bills of exchange on the vendee, drawn in his favor by the master. The bills are not equivalent to payment. They are simply evidence of the debt of the consignor, and do not deprive him of any other remedy, authorized by law, when the vendor becomes insolvent.[2]

570. And the right of stoppage is not lost, even if the consignor negotiates the bills. As endorser of the bills, he becomes conditionally liable to the holder, if protested for non-acceptance, or for non-payment. He becomes liable upon the bills not for the benefit of the drawer, but of the holder. And this liability does not have the effect to impair any of his remedies against the owner, who is bound to accept and pay them.[3]

571. Although the general doctrine of the right of the consignor of goods, sold on credit, to stop them while in their *transitus* to a consignor, who becomes

[1] Siffken v. Wray, 6 East's R. 371; 2 Kent's Com., 542.

[2] Newhall v. Vargas, 13 Maine, 103; S. C., 15 Maine, 314; Hodgson v. Loy, 7 T. R. 440.

[3] Ibid.

insolvent, is well established, and although there is little difficulty in determining who may exercise this right, yet difficulties often occur in particular cases, in determining whether the goods, at the time of the attempted exercise of the right of the consignor, are in their transit, or are to be treated as having arrived at their place of destination. This arises from the fact that no two cases are alike in all their circumstances, and the consequent inability to lay down any specific rule by which to ascertain the termination of the transit.

572. Formerly, it was supposed that the right of the consignor to repossess himself of the goods continued until the goods came to the "corporal touch" of the consignee. At a later period the expression was modified, and the familiar language of the Courts was, that the right of stoppage continued until the goods came into the *actual* possession of the consignee. It is now the uniform language of the cases, that the *transitus* is at an end whenever the goods, in pursuance of the original destination given to them by the consignor, have come into the possession of the consignee, whether that possession be *actual* or *constructive*.[1]

573. But what constitutes such actual or constructive possession of the consignee, as defeats the right of the vendor, is to be gathered rather from an ex-

[1] Sawyer v. Joselin, 20 Vt. 172; Frazier v. Hilliard, 2 Strob. R. 309; Donath v. Bromhead, 7 Barr, 301; Fetter v. Field, 1 La. R. 80; Mottram v. Heyer, 5 Denio, R. 529; Hays v. Mouille, 2 Harris, R. 48; Naylor v. Dennie, 8 Pick. 198; Allen v. Mercier, 1 Ash. 103.

amination of particular cases, than from any precise definition which has been given of the terms themselves. Where goods are attached on board a vessel, as the property of the consignee, this proceeding does not defeat the right of the consignor to stop them *in transitu*, because the transit is not ended by the arrival of the vessel in which the goods are shipped, nor until they are taken possession of on behalf of the consignee.[1]

574. And even where, upon the arrival of the vessel, the consignee demands the goods, but the master refuses to give them up unless paid a balance due for former freights, and upon this not being done, retains the goods and returns with them to the port of shipment, where, upon the vendee becoming insolvent, he attaches them as the property of the vendee for his balance; in such a case, it is held that the vendor has not lost his right of stoppage, but upon tendering to the master the amount of freight due upon the goods, is entitled to receive them.[2]

575. Where goods are consigned, but the duties not being paid, are lodged in the government stores, the consignor may stop them *in transitu*, if he claims them before they are actually sold for the payment of the duties; or if sold, he is entitled to the proceeds.[3] And the same principle applies to a case where, upon the arrival of the goods at the port of destination, the vendee pays freight, and gives his

[1] Naylor v. Dennie, 8 Pick. 198.
[2] Allen v. Mercer, 1 Ash. R. 103.
[3] Northey v. Crags, 2 Esp. 613.

note for the price, but owing to the loss of the invoice the goods are not entered at the custom-house, but are stored there by the officers of the customs, and remain there until the dishonor of the note. The payment of freight does not amount to a constructive possession, so as to put an end to the *transitus*, any more than an actual payment of part of the price.[1]

576. But where the goods are landed upon the wharf, which is the usual place of the consignee receiving his goods, and neither the wharfinger, nor

[1] Donath v. Broomhead, 7 Barr, 301. The question, in this case, was, whether the defendants had lost their right of stoppage *in transitu*. These were the facts. In 1836, one Tryon ordered certain hardware from Broomhead & Thomas, merchants in England, which arrived in Philadelphia in the Octorara, on the 15th of April, 1837, consigned to Tryon, and accompanied by an invoice and bill of lading. On the 18th, Tryon paid the freight, and on the 25th gave his note at four months for the invoice, exchange, and interest, to the agent of Broomhead & Thomas, who retained it until maturity, when it was dishonored. In consequence of the loss of the invoice, Tryon was unable to enter the goods at the custom-house, to which they were removed from the vessel by the officers. On the 19th of May, Tryon assigned for the benefit of creditors, and Donath, the plaintiff, was appointed assignee. After the dishonor of the note, the agent for defendants claimed the goods on their behalf, and notice was given to the collector. Donath, the assignee, also claimed the goods. On the 3d of July, 1843, the goods were sold by order of the collector, and the net proceeds paid into the hands of G. S., to abide the result of this suit. It was held, that as the goods had not been entered at the custom-house, the consignee was not entitled to the actual possession of them. They were in the possession of the officers of the law, the *transitus* was not ended, and the consignor retained the right to intercept them.

any person for him, or for the carriers, has any charge of the goods, in that case they lay upon the wharf, subject to the control and direction of no other person than the consignee, and, therefore, in contemplation of law, they are in his possession, and the *transitus* is ended.[1]

577. So, too, where goods are placed in the public store under the warehousing system, either in this country or in England, after a perfect entry of them for that purpose, they are to be considered as having come to the possession of the vendee, at the place where he intends they shall remain until he gives further order for their disposal; and the law recognises his right to sell or dispose of them as he pleases, subject only to the custody of the officers of the revenue for the security of the payment of the duties, at the time when by law those duties become due and payable.[2]

578. The delivery of part of the goods, if not intended as a delivery of the whole, but is simply a separation for the purpose of that part only, leaves all the rest *in statu quo*. But when each part is taken away with the intention to take possession of the whole, not to separate the part that was delivered from the remainder, in that case, it is held to be a delivery of the whole cargo, and the *transitus* is terminated. Because, if there was no intention to sepa-

[1] Sawyer v. Joslin, 20 Vt. 172; Frazer v. Hilliard, 2 Strob. R. 309.

[2] Mottram v. Heyer, 5 Denio's R. 629; Strachan v. The Trustees of Knox & Co., cited in Brown on Sales, 536.

rate the particular part from the remainder, that incipient delivery, so to speak,—that inchoate delivery, will amount to a determination of the right to stop *in transitu*.[1]

579. In the case of Betts v. Gibbins,[2] Taunton, J., observed, that "a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant." According to this, the law presumes that the part delivery is intended as a delivery of the whole. If it were not, then the actual intention must be shown from the circumstances.

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[1] Tanner v. Scovell, 14 M. & W. 27. In this case goods were forwarded in bales by ship to London, deliverable to B. & Co., or their assigns, who were factors for sale; and were landed at the defendant's wharf. B. & Co. gave the defendants orders to "weigh and deliver" the goods to M., who had contracted with B. & Co. for the purchase of them. They were accordingly weighed, and an account of the weights sent to B. & Co., who made out invoices to M. accordingly. M. re-sold several bales of the goods, which were delivered by the defendants, upon his order, to his vendees: the rest remained on the defendant's wharf until they were stopped by B. & Co. as unpaid vendors. They were never transferred in the defendant's books from the name of B. & Co. to that of M., nor was any warehouse rent paid by him: held, first, that, upon these facts, the defendants never stood in the relation of wharfingers to M., so as to be liable to an action on the case by him for the non-delivery of the goods to his order. Secondly, that, under these circumstances, B. & Co.'s right of stoppage *in transitu* was not determined by the part delivery to M.'s vendees. See, also, upon the doctrine stated in the text, Slubey v. Heyward, 2 H. Bl. 504; Bunney v. Poyntz, 4 B. & Ad. 571; S. C., 1 Nev. & M. 229; Jones v. Jones, 8 M. & W. 431; Buckley v. Furness, 17 Wendell's R. 504; S. C., 15 Wend. R. 137.

[2] 2 Ad. & Ell. 57; S. C., 4 Nev. & M. 64.

580. This is erroneous, and was expressly declared to be so, in the case of Tanner v. Scovell,[1] where it was said that "the whole" (that is, the question whether a part-delivery is considered by the law as a delivery of the whole), "in truth, depends on the intention of the vendee." If, as already observed, the vendee takes possession of part, not meaning thereby to take possession of the whole, but to separate that part, and to take possession of that part only, it puts an end to the transitus only with respect to that part, and no more: the right of lien and the right of stoppage *in transitu* on the remainder still continue.

581. If the goods are delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping *in transitu* remains after the shipment.[2] But, if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed; because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment.[3]

582. The same rule governs, if the consignee is the ship-owner. If the goods are delivered on board his ship, to be carried to him, an actual possession

[1] 14 M. & W. 27.

[2] Bothlingk v. Inglis, 3 East's R. 331; Fowler v. Kymer, Ibid. 396.

[3] 7 D. & E. 442; Stubbs v. Lund, 7 Mass. 457.

by him after the delivery is provided for by the terms of the shipment; but if the goods are put on board his ship to be transported to a foreign market, he has on the shipment all the possession contemplated by the bills of lading. In the former case, the transit continues until the termination of the voyage; but, in the latter case, the transit ends on the shipment.[1]

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[1] Stubbs v. Lund, 7 Mass. 457. The doctrine of this case, with a solitary exception, seems to have commanded the confidence of the profession. It was rejected, however, in the case of Bolin v. Huffnagle, 1 Rawle's R. 1, the Court in that case proceeding upon the principle that the destination of the goods was immaterial, and that a delivery of them to the master of the consignee's own ship put an end to the *transitus*. In the case of Newhall v. Vargas, 13 Maine, 93, Weston, J., after an examination of the decision in the case of Bothlingk v. Inglis, 3 East, 381, thus refers to the case of Bolin v. Huffnagle: "It is a little remarkable," he observes, "that in Bolin v. Huffnagle, the Supreme Court of Pennsylvania, although their attention was called to the case last cited (Bothlingk v. Inglis), decided otherwise; and principally upon the authority of the cases there commented upon, giving them an effect and bearing disclaimed by the Court by whom they were decided. The learned Judge by whom the opinion of the majority of the Court was delivered goes into an elaborate consideration of a delivery, actual and constructive; and deduces that it is only when the delivery is constructive that the right of stoppage exists. A delivery on board the consignee's or vendee's own ship he calls actual. But a delivery to the servant or agent of the party is as much actual as if delivered to the party himself. And whether that servant or agent is specially deputed for the purpose, or some one is deputed, having similar commissions to discharge for others,—whether the vendee employs his own vessel or carriage, or causes the goods to be transported, for an adequate compensation, in that of another,—does not appear to us to make any difference. The delivery is actual in the one case as well as in the other. The sale is complete. The property is transferred. The right of stoppage is not founded

583. The same distinction exists in the case of a general ship. If a ship sail from this country to Great Britain, with the intention of taking on board goods for divers persons on freight, to be transported to a foreign market, as the mercantile adventures of different shippers,—if goods are so shipped by the several consignors, there is no transit to the consignees after the shipment; and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship on their own credit and risk; for a future actual possession by them is provided for in the bills of lading.[1]

584. A delivery to a warehouseman or wharfinger at the place of the ultimate destination of the goods, who does not receive them as the mere agent of the purchaser, but in the ordinary course of his business as a middleman, is not a constructive delivery to the purchaser, so as to put an end to the right of stoppage *in transitu*.[2]

585. In the case of Edwards v. Brewer, the goods were sold, to be delivered at the port of London.

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upon any imperfection in the sale, nor does it rescind the contract; it only authorizes the vendor to take the goods, until the price is paid. Two out of the five members of the Court did not concur in the judgment cited from Rawle. The opinion of the dissenting Judges seems to us to be best supported by authority." See also, to the same effect, 2 Kent, 545; Rowley v. Bigelow, 12 Pick. 307, 314.

[1] 7 Mass. 158.

[2] Edwards v. Brewer, 3 M. & W. 375; Covell v. Hitchcock, 23 Wend. R. 611.

The master of the vessel, on arriving at that port, called at the office of the purchaser, and requested his clerk to send for the goods, and told him that, if he did not, he should be under the necessity of landing them at the wharf where his vessel was then lying. The clerk promised to send a note to the wharf-office; and he accordingly sent a note to the master of the vessel, saying that the purchaser was from home, but that he had better land the goods at that wharf, on his account. He accordingly landed them, but had it entered in the wharfinger's books that the freight and charges were to be paid before the delivery of the goods. Lord Abinger, and the other Judges of the Court of Exchequer, held that the delivery of the goods to the wharfinger did not prevent the right of stoppage *in transitu*, until the vendee had actually called and taken possession of them; that the note of the clerk was not a peremptory order, but only an expression of opinion; and that the wharf, although it was the place where the vendee was to call and receive the goods, was only a place of deposit, *in transitu*.

586. The Court proceeded upon the same principle in the case of Covell v. Hitchcock; that is, that the transit continues so long as the goods remain in the possession of the middleman, whether he be the carrier either by land or by water, or the keeper of a warehouse or place of deposit connected with the transmission and delivery of the goods. If the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as

his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new and further order to be given to him, that constitutes a case of constructive possession.[1]

587. Chancellor Kent seems to be of opinion that the question of constructive delivery may, in all cases, be determined by this rule: "If the delivery to a carrier or agent as the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent for safe custody, or for disposal on the part of the vendee, and the middleman is by agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage."[2]

588. If a carrier, after notice from the vendor to stop goods, does by mistake deliver them to the vendee, the right of the vendor will not be taken away, even though, owing to the vendee's having become bankrupt, the goods may have passed into the hands of his assignees;[3] nor will the delivery by the master of the vessel, to the consignee, of the bill

[1] Whitehead v. Anderson, 9 M. & W. 534. A delivery to a mercantile house, merely for transmission by a forwarding-house to the vendee, does not amount to a delivery to the vendee. 2 Harris, 48.

[2] 2 Kent's Com. 545.

[3] Abbott on Shipping, p. 629, and cases cited.

of lading retained by the master for his own use, vest in the consignee the legal right to the property, if he would not otherwise possess it.[1]

589. It was said by Judge Washington, in the case of Walter v. Ross, that the possession of a bill of lading to order, not endorsed; a promise by the shipper to endorse it, or to send a bill of lading; or, perhaps, even a letter of advice, stating the shipment to be to a particular person, might, as between those parties, and where the consideration is paid, give to the consignee an equitable title, sufficient to repel the right of the consignor to countermand, and even to defeat the legal right of the holder of the bill of lading, with notice of the circumstances. The master would, in such case, certainly act at his peril, in delivering the cargo to such equitable claimant; but if his title as such could be made out, it is probable he would incur no risk. Whatever exceptions may be sustained, upon the ground of equitable title, the general doctrine is, that if the consignee of goods makes a bill of sale of them, before they come to his possession, and *before he has received* the bill of lading, the consignor may stop them *in transitu*, or direct a different delivery, and the vendee would have no title by such sale against him.[2]

590. Goods are frequently sold while stored in a warehouse, and nice questions have arisen as to what

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[1] Walter v. Ross, 2 Wash. C. C. R. 283.

[2] Illsley v. Stubbs, 9 Mass. R. 67; Abbott on Shipp., Story's note, p. 630.

acts in such cases will amount to a delivery, so as to preclude the vendor from resuming possession of them upon the intervening insolvency of the vendee. It is admitted that if the vendor gives the vendee an order upon the warehouseman for the goods, and if the vendee has handed the order to the warehouseman, and he has made the usual entry in the books changing the name of the proprietors, the right to stop them *in transitu* is gone, and the warehouseman is bound to hold them as the agent of the purchaser,[1] and the same result follows, if the buyer delivers the order to the warehouseman, without any actual transfer being made in his books.[2]

591. If, after goods are sold, they remain in the warehouse of the vendor, and he receives warehouse rent for them, this amounts to a complete transfer of the goods to the purchaser.[3] And if it is a part of the consideration of the purchase, that the goods may lie in the vendor's warehouse rent free, until the vendor should want the room, this amounts to such a complete transfer of the goods as to put an end to the right of stoppage *in transitu*. It is sufficient, for all the purposes of an executed delivery, if, in the intent of the parties, the one parts with, and the other receives the property, although there

[1] Harman v. Anderson, 2 Camp. R. 243; Abbott's Shipp., 630.

[2] Ibid.; Hollingsworth v. Napier, 3 Caines' R. 182. In this latter case, there was a delivery of a bill of parcels, as well as an order on the storekeeper.

[3] Hurry v. Mangles, 1 Camp. R. 452; Phillmore v. Barry, Id. 513; Green v. Haythorne, 1 Starkie's R. 147.

is no change of place.[1] Thus, putting a mark on the goods is a delivery.[2]

592. So, weighing the goods by the vendee has been held a complete delivery.[3] If a man is in the habit of using the warehouse of a wharfinger as his own, and makes that the repository of his goods, and disposes of them there, the *transitus* will be at an end when the goods arrive at such warehouse.[4] Every case of this sort must depend on its special circumstances. A safe rule, however, by which to test the question of delivery (in cases as to the vesting of property) is, whether anything remains to be done by the seller, as between him and the buyer, before the commodity purchased is to be delivered. If so, a complete present right of property has not attached in the buyer.[5]

593. The delivery of a shipping note by the consignee of goods to a third person, with an order to the wharfinger to deliver the goods to such third person, does not pass the property in them so as to prevent a stoppage *in transitu* by the consignor. The shipping note does not amount to a bill of

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[1] Barrett v. Goddard, 3 Mason's R. 107.

[2] Ellis v. Hunt, 3 T. R. 464; Stoveld v. Hughes, 14 East, 308, 312.

[3] Hammond v. Anderson, 4 B. & Pull. 69.

[4] Tucker v. Humphrey, 4 Bing. R. 516; Foster v. Frampton, 6 B. & C. 109; 3 B. & P. 127.

[5] Hanson v. Meyer, 6 East, 614; Austin v. Craven, 4 Taunt. 643; White v. Wilks, 5 Id. 176.

lading: a bill of lading is exactly like a bill of exchange, and the property it refers to passes by endorsement on it, but not by delivery of it without endorsement. A shipping note, from the nature of it, is not endorsible, nor is an invoice (which is only a mercantile name for a bill of parcels), and therefore the transfer of neither operates to change the property.[1]

594. To exercise the right of stoppage *in transitu*, it is not requisite that the vendor should obtain actual possession of the goods while on their way to their destination. A demand of the goods of the carrier, or notice to him to stop the goods, or an assertion of the vendor's right by an entry of the goods at the custom-house, or a claim and endeavor to get possession, is equivalent to an actual stoppage of the goods.[2]

595. It is now well settled, as we have already incidentally stated, that bills of lading are transferable by endorsement, and thus may pass the property. Whenever, therefore, the consignee, for a valuable consideration, endorses the bill of lading to a *bonâ fide* purchaser, who has no notice of any adverse interests, the latter becomes as against the world, the owner of the goods. It matters not whether the consignee, in such case, be the buyer

[1] Akerman v. Humphrey, 1 Carr. & Payne, 52; S. P. 4 Bing. R. 516.

[2] Story's Abbott, p. 632, and authorities cited.

of the goods, or the factor, or agent of the owner. His transfer, in either character, is equally capable of divesting the property of the owner, and vesting it in the endorsee of the bill of lading, and when so vested the right of stoppage is gone.[1] The right of the consignor to stop the goods *in transitu*, upon the intervening insolvency of the consignee, cannot be exercised, if the goods were shipped to pay a real debt due from the consignor to the consignee.[2]

596. And so, too, if the consignee is entitled to the property for the use of a third person, although he acts as agent for the shipper, he stands in the character of a trustee for such third person; and if the consideration has been paid by the *cestui que trust*, the consignor can no more reclaim the property than he could if the same had been consigned directly to the person for whose use the property was intended.[3]

597. The simple fact, that the assignee of a bill of lading had notice that the goods were consigned on credit, is not sufficient of itself to render the assignment defeasible by the stoppage of the goods in their transit, if the transaction is not otherwise tainted

[1] Conrad v. Atlantic Ins. Co., 1 Peters' Sup. Ct. R. 386; Stanton v. Eager, 16 Pick. 473; Chandler v. Sprague, 5 Metcalf, R. 308; Mason v. Lickbarrow, 1 Smith's Leading Cases, Amer. Ed., p. 507, and cases there cited and analyzed.

[2] Wood v. Roach, 2 Dall. R. 180; S. C., 1 Yates's R. 171.

[3] Walter v. Ross, 2 Wash. C. C. R. 288.

with fraud. But if the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent as against the rights of the consignor.[1]

[1] 2 Kent's Com. 550; Cumming v. Brown, 9 East, R. 506. As to the transfer of the bill of lading, and a change of the papers by the consignor and master, with a view to divest the interest of the consignee, see 1 Binn. R. 106; 2 Wash. C. C. R. 283, 294, 403.

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